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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DYNALECTRIC COMPANY and G. W. WALTHER EWALT,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether contract performance and receipt of payment makes a conspiracy to rig bids on a single transaction a continuing crime for purposes of the *ex post facto* clause of the Constitution and the statute of limitations.

2. Whether it is error for a trial court to refuse to instruct the jury on the standards for determining the lawfulness of a joint venture, where there was evidence that the joint venture was lawful, where the theory of defense was that the joint venture was legitimate, and where the charge of defendants' continued participation in a bid-rigging conspiracy was based on membership in that joint venture.

3. Whether in a bid-rigging prosecution under the Sherman Act and mail fraud statute it is error to exclude defense economic evidence showing the absence of an overcharge, where evidence of defendants' profits was used to prove the existence of a conspiracy to rig bids and the essential element of money or property in a scheme to defraud.

RULE 28.1 LIST

Petitioner Dynalectric Company is a wholly owned subsidiary of JWP Inc. It formerly was a subsidiary of Dynalectron Corporation, whose name has been changed to Dyncorp.

The parties to the proceedings below were the petitioners, Paxson Electric Company, Wesley C. Paxson, Sr., Fischbach and Moore, Incorporated and the United States.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Dynalectric Company ("Dynalectric") and G.W. Walther Ewalt ("Ewalt") hereby petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on November 21, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, 1a-48a) is reported at 859 F.2d 1559. Both defendants were convicted on April 17, 1987 after a jury trial in the Northern District of Georgia.

JURISDICTION

The judgment of the Court of Appeals was entered on November 21, 1988. A timely petition for rehearing *en banc* was denied on January 4, 1989 (App. B, *infra*, 49a-50a), whereupon this petition for certiorari was timely filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The United States Constitution provides that "No Bill of Attainder or ex post facto Law shall be passed." U.S. Const. art. I, § 9, cl. 3.

Section One of the Sherman Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1.

The mail fraud statute provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses . . . knowingly causes to be delivered by mail . . . any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1341.

The applicable statute of limitations provides:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

18 U.S.C. § 3282.

The Criminal Fines Improvement Act of 1984 provided in pertinent part:

(a) An individual convicted of an offense may be fined not more than the greatest of—

* * * *

(1) the amount specified in the law setting forth the offense;

(3) in the case of a felony, $250,000;

* * * *

(c) (1) If the defendant derives pecuniary gain from the offense, or if the offense results in pecuniary loss to another person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

18 U.S.C. § 3623 (Supp. IV 1986) (current version at 18 U.S.C.A. § 3571 (Supp. 1988)). These provisions apply only to "offenses committed after December 31, 1984." Pub. L. 98-596 §§ 6(a), 10, 98 Stat. 3136 (1984).

STATEMENT OF THE CASE

Petitioners, an electrical contracting firm and its former president, were convicted following a jury trial under Section 1 of the Sherman Act, 15 U.S.C. § 1, and the mail fraud statute, 18 U.S.C. § 1341. The indictment, which was returned on September 19, 1986 charged petitioners and Paxson Electric Company, its president Wesley C. Paxson, Sr. and Fischbach and Moore, Incorporated, with conspiring to submit rigged bids on September 7, 1979 to perform the electrical subcontract work for an EPA-funded construction project in DeKalb County, Georgia. The indictment alleged a pre-bid agreement for Paxson Electric to submit the low bid and form a "silent" joint venture with Dynalectric for splitting the profits. Counts II and III charged that because the final two payment checks for electrical work were mailed by the general contractor, one in May 1984 and the other in January 1985, the alleged bid-rigging conspiracy also constituted a scheme or artifice to defraud under the mail fraud statute. (App. D, *infra*, 55a-65a).

In 1979, DeKalb County announced that it would take bids for a major expansion of its Snapfinger Creek sewage plant, and set a bid date for September 7, 1979. Bid teams from large general contracting firms based in Alabama, Maryland, New York and Colorado went to Atlanta and set up quarters to study the job, obtain quotes from suppliers and subcontractors, prepare cost estimates and submit bids to the county. Following industry practice, "bid scope" letters were delivered to them by prospective subcontractors with the individual price items blank so that actual prices could be phoned to them shortly before bid time.

Dynalectric, based in Virginia, was a newcomer to the electrical contracting industry and had recently expanded into the Southeast with the acquisition of Gateway South Electric, a struggling local Atlanta company. Dynalectric employed the former principals of Gateway. One of them, Edward Baylin, was named to manage Dynalectric's Atlanta office.

Although the Atlanta office had worked on a cost estimate, Ewalt (who was then Dynalectric's president) lacked confidence in the ability of Baylin and his staff to accurately assess the work. He sent William McAuliffe, who had experience with heavy industrial projects similar to Snapfinger, to Atlanta to help. McAuliffe began working with Baylin on September 5 but they were unable to agree on a manhours figure to use. Baylin insisted that the job required only 36,000 manhours while McAuliffe maintained that at least 54,000 manhours were needed.[1] On September 6, Ewalt flew to Atlanta as did Woodson Sosh, the head of Dynalectric's Owensboro, Kentucky office, who was to be responsible for the project. A confrontation with Baylin and McAuliffe did not resolve the impasse. That evening, Ewalt, Sosh and McAuliffe met again at the Airport Hilton, where they were

[1] The job actually needed 83,000 manhours, of which 71,000 were for the original scope of the work and the rest reflected change orders.

all staying, and again reviewed the manhour estimates. They met again the next morning at the Atlanta office, where they settled on a price to quote.[2] After learning from one of the general contractors that they "were in the ball park" Dynalectric phoned a price cut of $305,000 to each of the general contractors shortly before bid time, reducing its base bid from $5,363,000 to $5,058,000 in a last minute effort to win the electrical subcontract.

Within minutes after the 1:30 p.m. bid opening, The George Hyman Company from Bethesda, Maryland was determined to be the low bidder with a price of $45,339,000. Hyman's bid named Paxson Electric (which had quoted $4,885,000) as its designated electrical subcontractor.[3]

Although Hyman's price was low, it soon became apparent that its bid was in jeopardy. A minority firm, Southeast Grading Co., appeared at the bid opening and also addressed a letter protesting that none of the six subcontractors named in Hyman's bid was a minority firm. These circumstances were seized by Ewalt in an effort to secure the electrical work for Dynalectric, despite the fact that Paxson had been designated by Hyman. Ewalt's plan was to enlist a qualified Minority Business Enterprise ("MBE") to team up with Dynalectric and to contract some of the electrical work to it, thereby overcoming the minority participation problems facing Hyman.

Ewalt's initial proposal was for Paxson to agree to a joint venture with Dynalectric as the operating partner

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[2] Ewalt testified that while manhours was the big issue of discussion, he was also concerned of the "fact that we were in a period of high inflation and we were in a period of time where material prices you really couldn't quote—you couldn't count on suppliers like you can today."

[3] Fischbach initially bid $5,957,000, and the bid scope letters from the general contractors show that it later cut its price by $200,000. One of the general contract bidders, a joint venture of local Atlanta firms, designated Fischbach as its proposed electrical subcontractor.

and using an affiliated MBE to perform the work. Paxson balked at giving up control of the job, but ultimately acquiesced in agreeing to let Dynalectric form a joint venture with his company, sharing all profits or losses 50-50 and having CCC Electric ("CCC"), a minority firm affiliated with Paxson Electric,[4] participate to help resolve the minority problem. Paxson was willing to relinquish part of the contract because he feared that Ewalt might persuade Hyman to switch the business to Dynalectric and whatever minority partner it could bring in. Moreover, Dynalectric's willingness to underwrite half the losses was an added incentive for Paxson since it reduced its exposure on a risky job that was considerably larger than most of its undertakings.

The agreement to form the joint venture arose from a series of calls between Ewalt and Paxson in September and October 1979. During that period, Hyman had negotiations underway with the EPA and DeKalb County to overcome the minority participation objections.[5] When Ewalt and Paxson reached their agreement, it was believed that CCC would only perform a percentage of the work and that Paxson would be running the project. However, because of the aggressive stance taken by EPA's regional office, the entire electrical job was turned over to CCC. A contract was finally awarded to Hyman in November; work began and a subcontract between Hyman and CCC was executed on January 14, 1980 in the amount of $4,915,000.

The electrical work by CCC on Snapfinger was supervised by Robert Lassetter, a vice-president of Paxson Electric. At the beginning of the project, meetings were held between Lassetter, his staff, Ewalt and Dynalectric

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[4] Paxson Electric owned a 49% interest in CCC, 51% of which was owned by two minority individuals. CCC, had a project underway in Atlanta, but on a prior occasion had failed to gain approval as an MBE.

[5] CCC was not approved by the EPA as a qualified MBE until November 5, 1979.

personnel where plans were reviewed, particularly with respect to the establishment of manning levels for certain phases of the job. They drew on Dynalectric's recent experience on a similar waste water project in California. In January 1981, Dynalectric's new Atlanta manager, Philip Waagner, began monitoring the job, consulting with Lassetter on a regular basis providing advice on such things as pulling cable.[6] Dynalectric contributed free PVC conduit for CCC to use on the job and provided large quantities of wire and cable, at cost, through a wholesale distributorship it operated in Kentucky.

The project was successful not only because of skillful management, but because of the unusually good relations that CCC and Lassetter had with the local IBEW. The union permitted CCC to use a higher percentage of laborers as opposed to journeymen, sharply reducing labor costs. The fact that the joint venture was unpublicized aided this, since if the IBEW knew that a large company like Dynalectric was behind the project, it would have insisted on using more journeymen. In addition, favorable weather at key stages of the construction and Hyman's well-organized operation avoided the work stoppages and delays that often wipe out profits for subcontractors.

By the time the project was completed in 1983, the electrical contract had expanded to $6.3 million because of 35 change orders. Total profits on the job were $1,760,000, of which $880,000 was remitted to Dynalectric pursuant to the joint venture agreement.[7] A final settlement check for $375,000 (the balance due after two payments in 1982 totalling $505,000) was transmitted to Dynalectric upon the termination of the joint venture and execution of a final release on November 1, 1983.

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[6] The project had literally hundreds of miles of copper cable that had to be drawn through mazes of conduits and duct banks.

[7] This was gross operation profit because overhead and G&A were not charged to the job. The court of appeals' calculation of a 40% profit (App. A at 32a) is wrong. The gross profits represented only 28% of the total contract price.

The prosecution's case was based upon the immunized testimony of Bernard Trepte, former Atlanta manager for Fischbach,[8] who had exposure to prosecution from bid-rigging activities over a 10-year period. Trepte said that on the night before the bids, he met with Paxson in Paxson's room at the downtown Atlanta Hilton, where they were joined by Ewalt. Trepte testified that he proposed setting up the job by seeking "support" for Fischbach's bid but was rebuffed. Trepte said that he told Ewalt and Paxson that he would support Paxson if they reached an agreement. Trepte described the meeting as "sort of quick" and said that when he left, "I didn't have any understanding of any arrangement that had been worked out." He said, however, that he expected to receive a telephone call the next day.

According to Trepte, he received a call at 10 o'clock on bid day giving him a price to quote and advising him that "there had been an arrangement that was satisfactory to the parties." Trepte could not identify the caller, nor did he identify who "the parties" were.[9] He said that in accordance with the phone call he increased the competitive price he had prepared by $500,000 and quoted that to the general contractors. According to Trepte, the consideration for his support for Paxson's

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[8] Fischbach, the world's largest electrical contractor was also indicted. It pleaded guilty pursuant to a plea agreement which also disposed of indictments in a number of other cases, and was fined $500,000.

[9] The trial court admitted this testimony, subject to later connection, on grounds that "the substance tends to authenticate the source." At the close of the government's case-in-chief, the court ruled that the anonymous call was a non-hearsay statement and was not admitted for the truth of the statement. The prosecutor, realizing that without that telephone call, there was no evidence of agreement, argued that it was hearsay, but that the events of the night before provided independent proof of conspiracy to make the statement admissible under Fed. R. Evid. 801(d)(2)(E). The court then decided it was admissible for its truth because of "independent evidence of conspiracy," mainly the joint venture profit payments to Dynalectric and Baylin's belief the bid was high.

bid was the forgiveness of a preexisting $89,330 debt that Fischbach owed Paxson. However, Trepte never said when, where or by whom this debt forgiveness was agreed to, that it was ever discussed with Ewalt, or that it was even mentioned in the anonymous phone call.

To buttress Trepte's testimony about the alleged meeting in Paxson's hotel room, the government introduced Ewalt's expense record for his Atlanta trip. It showed a $23 taxi fare from the "Hilton at Airport to Hilton downtown and return" on September 6, 1979. Ewalt denied ever meeting with Trepte and Paxson and explained that his taxi trip to downtown Atlanta was to call on general contractors to show the seriousness of Dynalectric as a prospective electrical contractor on this major project. Ewalt could not recall details as to which of the contractors he met on that evening nearly eight years earlier, or specifically whether he had delivered Dynalectric's bid scope letters. But he knew that he had not met with Paxson and Trepte. In its rebuttal case, the government called four persons who had been members of the general contractor bid teams, who said they did not remember Ewalt calling on them on that night.[10] The prosecutor then used those nonrecollections to argue to the jury that their testimony contradicted Ewalt.

A major part of the government's case—and the most damning circumstantial evidence against the defendants —was the level of profits earned by the joint venture and the $880,000 payment to Dynalectric.[11] The heavy emphasis placed on the size of profits was undoubtedly what

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[10] A contemporaneous record from one of the general contractors had a handwritten notation of Ewalt's name and phone numbers stating that he "will come by Thursday" (September 6, 1979 was a Thursday), but no one could remember the visit to support Ewalt's testimony.

[11] The prosecutor hammered on the payment of $880,000 repeatedly in opening arguments and summation, as well as countless times throughout the trial. He even was permitted to encase the payment checks in plastic envelopes when the exhibits were sent out with the jury.

persuaded the jury to credit Trepte's testimony and disbelieve Ewalt and Paxson regarding the alleged hotel room meeting.[12] The indictment alleged (in five places) that the bid prices were "artificially high." The prosecutor's presentation included testimony by Baylin (who had grossly underestimated the manhours) who thought Dynalectric's bid price was high, the introduction of a series of interim job progress reports solely to underscore the profit figures, and testimony by Dynalectric's controller who, adopting prior grand jury testimony, said that he was unaware of a comparable job with the same level of profits.[13]

Defendants sought to counter the prosecutor's presentation and support Ewalt's testimony [14] with economic evidence showing how the profitability of the job had been influenced by circumstances that could not have been predicted in September 1979 when the price was quoted for a fixed-price contract extending three or four years into the future. It was important to place the Snapfinger bidding in its economic setting as of September 1979 when, in the wake of the Iranian revolution, oil prices were skyrocketing, odd-even gasoline lines were common, double-digit inflation seemed endemic, government experts were predicting oil prices to reach $100 a barrel, and prime interest rates were close to 20%. Dynalectric tendered the testimony of an economist who would have reminded the jury of those distant past events and would have explained that after President Carter appointed Paul Volcker (in October 1979) to head the Federal Reserve

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[12] This was a close case. The jury did not return its verdicts until the end of the third day of deliberations.

[13] The court of appeals, *sua sponte,* remarked several times that the prices and profits, which it incorrectly said were 40%, were "seemingly high," App. A at 30a n.19, and were the basis for its conclusion that there was an overcharge.

[14] Ewalt had explained how economic events after award affect profitability. "I bid a job one time, and I bid a 3-year job and I bid escalation, and Richard Nixon put in wage freezes, and all the escalation I bid became profit to us."

Board, clamps were placed on the economy and, in the following years, energy prices plummeted and the country experienced a general recession. Also offered was evidence of soaring copper prices and wire and cable shortages as of September 1979, including a comprehensive International Trade Commission report which chronicled these events. Dynalectric also sought to have a witness make comparisons with a comparable project that was bid shortly after Snapfinger.

This economic evidence was important to corroborate Ewalt's and Paxson's testimony that the Snapfinger job was bid competitively, and also to refute the government's claim of exorbitant profits. The trial court, however, excluded all of this evidence declaring variously that bid rigging is a *per se* offense and the reasonableness of the prices was irrelevant, that there was no evidence that the defendants talked about copper prices while they prepared their bids, and finally that there was no evidence of any overcharge.

It was uncontradicted that the joint venture was not agreed to, or even discussed, until after the bidding. The theory of prosecution, however, was that the joint venture was the "pay off" to Dynalectric for agreeing to support Paxson's bid. The government has conceded on appeal that there was evidence "that the joint venture was lawful and innocent," but at trial argued repeatedly that the joint venture was "phony". The court refused to instruct the jury on standards for determining the lawfulness of the joint venture and the jury was allowed to presume that it was part of the alleged bid rigging agreement and was therefore *per se* unlawful.

At the close of the government's case-in-chief, the trial court dismissed the mail fraud counts because "the element of causation is too remote," but then reversed itself the next day, evidently on the basis of an aiding and abetting theory advanced by the prosecutor.[15]

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[15] The two checks, which represented barely three percent of the total electrical work, were mailed long after the work was com-

At sentencing, the trial court stated that the fact that "these offenses occurred in 1979" was "a mitigating factor," but nevertheless sentenced Ewalt to an unusually long prison term and imposed fines that exceeded the maximums prescribed in the Sherman Act and mail fraud statute. (App. C, *infra*, 51a-54a).

On appeal, the court of appeals affirmed the convictions and sentences. It ignored a significant constitutional issue and erred in its interpretation of the statute of limitations as applied to conduct alleged under the Sherman Act. Relying on flawed interpretations of conspiracy law and of decisions in other circuits, the court of appeals erroneously held that payments made during and after construction of the Snapfinger project were in "fulfillment of the objectives of the conspiracy" and therefore continued the conspiracy to within the statute of limitations. App. A at 9a. Moreover, the court of appeals rejected without discussion (App. A at 48a n.32) defendants' compelling argument that the harsher sentences, which were instituted pursuant to a law that was not enacted until October 1984, were imposed on conduct that was alleged to have taken place in 1979, and therefore violated the *ex post facto* clause of the Constitution.

The court of appeals acknowledged that the defense at trial was that the joint venture was legitimate, yet it did not even address defendants' claim that the jury should have been instructed as to this theory. Finally, the court of appeals failed to correct the trial court's wrongful exclusion of economic evidence that would have countered the prosecution's contention that the bids were "artificially high" and, therefore, must have been rigged.[16]

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pleted and after the final settlement dissolving the joint venture. Dynalectric did not participate in any of those proceeds.

[16] In a lengthy footnote, the court of appeals sought to justify the exclusion of defendants' economic evidence with the *ipse dixit* that it "did not explain why the prices and profits were seemingly high." App. A at 30a n.19.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Is In Conflict With This Court's Decisions Regarding Continuing Conspiracies

This case presents questions of compelling importance as to constitutional standards and principles of antitrust conspiracy law. The opinion below creates an unsettled dimension of criminal law in which the scope of a Sherman Act conspiracy is determined by arbitrary factors wholly unrelated to the conduct outlawed, and varies wildly from case to case.

This Court has not ruled on the issue of when the crime of bid rigging or price fixing is complete. However, the decision below cannot be reconciled with holdings of this Court both as to matters of general conspiracy law and as to the nature of Sherman Act offenses. To be sure, the instant indictment alleged that the conspiracy continued until the last payment in January 1985. But this Court has held that it is not the scope of the alleged agreement that determines the duration of a conspiracy. Rather, its duration is determined by the criminal offense charged and the scope of agreement to achieve that "central criminal purpose." *Grunewald v. United States*, 353 U.S. 391, 405 (1957).[17]

The decision below ignores prior decisions of this Court, which differentiate between mere continuation of the "results" of a conspiratorial agreement and conduct which Congress has declared unlawful. Because of an erroneous concept of the law of continuing conspiracies and a misreading of precedent, the court of appeals affirmed sentences that violate the *ex post facto* clause and erroneously held that the Sherman Act conspiracy charges are not barred by the statute of limitations. In *Grunewald*, this Court made clear that in order for a conspiracy to continue, the objective to be accomplished

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[17] Like *Grunewald*, this is "a typical example of a situation where the Government, faced by the . . . bar of the statute [seeks] to open the very floodgates [and lengthen] the duration of a conspiracy . . . indefinitely." 353 U.S. at 404-405.

must be of the "central *criminal* purpose." Here, despite the fact that success in achieving the only arguably "unlawful objective"—restraining trade—was complete as of submission of bids, the court below held that performance and receipt of payment for work done under the resulting contract carried the alleged conspiracy to within the statutory period and beyond the 1984 enactment of the harsher "alternative fines" provisions under which petitioners were sentenced.

This Court has long held that "the mere continuance of the result of a crime does not continue the crime." *United States v. Kissel*, 218 U.S. 601, 607 (1910); *United States v. Irvine*, 98 U.S. 450 (1879). *Fiswick v. United States*, 329 U.S. 211, 216 (1946) amplified on this, stating: "Continuity of action *to produce the unlawful result*, or as stated in *United States v. Kissel*, 'continuous cooperation of the conspirators to keep it up' is necessary" (citation omitted) (emphasis added).[18]

The only "unlawful result" in this case was the alleged suppression of competition and the only "cooperation" that existed after the bidding was the commitment to perform a legally binding contract pursuant to a legitimate joint venture. That was not a restraint of trade, but rather was its fulfillment.[19] An examination of the

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[18] The court of appeals attempted to justify its ruling by asserting that lawful acts may be part of an unlawful conspiracy. App. A at 11a n.9. The fallacy of the court of appeals' reasoning as applied to this case is illustrated by its reliance on *United States v. Helmich*, 704 F.2d 547 (11th Cir.), *cert. denied*, 464 U.S. 939 (1983), an espionage case in which it was held that the payment for stolen secrets was part of the conspiracy. Payment for stolen secrets—or payment of kidnap ransom—are acts that can never be lawful; in the instant case, construction work properly performed and paid for and the joint venture itself were wholly lawful activities that, as most, were the "fruits" of the rigged bid, not its objective.

[19] The court below assumed without deciding that the restraint of trade ended when the contract was awarded. App. A at 11a n.9.

nature of Sherman Act offenses demonstrates the flaw in the lower court's position. Section One prohibits "every contract, combination . . . or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. The essence of a "restraint of trade" is the elimination or suppression of competition. *See Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927) ("[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition"). The "effects" on competition in this case, all of which are alleged in ¶ 20 of the indictment, were accomplished at the completion of the bidding. Therefore, whatever harm there was to competition occurred at that time.[20] At most, payments for the work performed are "the mere continuance of the *result* of a crime [which] does not continue the crime." *Kissel*, 218 U.S. at 607 (emphasis added).[21]

The court below cited four decisions in other circuits as precedent for holding that contract performance and receipt of payment make a Sherman Act bid-rigging conspiracy continue. The earliest of these was *United States v. Inryco, Inc.*, 642 F.2d 290 (9th Cir. 1981), *cert. dismissed*, 454 U.S. 1167 (1982), and was relied on by the other three circuits as being precedent. However, a careful reading of the opinions shows that the Ninth Cir-

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[20] It has been unquestioned for nearly a half century that Sherman Act liability does not turn on whether the conspiratorial prices were set at, above or below the competitive level: "they are fixed because they are agreed upon." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940) (the gravamen is conduct "interfering with the free play of market forces.")

[21] In *Kissel*, the Court addressed a conspiracy to drive a competitor out of business and it was the acts pursuant to that objective that were held to constitute a continuation of the conspiracy. Competition was still being restrained. There is nothing in the opinion to suggest that the defendants' enjoyment of higher sales or profits after the victim's departure from the market would make the conspiracy continue. In fact, *Kissel* strongly suggests to the contrary. 218 U.S. at 607-608.

cuit's rationale conflicts with the others on this point. In *Inryco*, the Ninth Circuit was careful to point out that the bid-rigging conspiracy continued after the award of the main contract because, by its terms, it restricted competition for the subsequent awards of subcontracts (the agreement "embraced also the objective of noncompetitive advantage in the subcontract . . . market.") 642 F.2d at 295. It was a continuation of those "restraints on competition" that led the court to sustain the indictment in that case.[22] The other circuits ignored this reasoning from *Inryco* when they relied on it to support holdings that performance and receipt of payment continues a conspiracy in restraint of trade. *United States v. A-A-A Elec. Co.*, 788 F.2d 242 (4th Cir. 1986); *United States v. Northern Improvement Co.*, 814 F.2d 540 (8th Cir.), *cert. denied*, 108 S. Ct. 141 (1987);[23] *United States v. Evans & Assocs. Constr. Co.*, 839 F.2d 656 (10th Cir.

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[22] This distinction was amplified in *United States v. Walker*, 653 F.2d 1343 (9th Cir. 1981), *cert. denied*, 455 U.S. 908 (1982), a Section 371 conspiracy to defraud case, where the Ninth Circuit stated that *Inryco* "was based in part on the anticompetitive nature of the subcontracting awards [the alleged payoff] themselves; it stated that any act in furtherance of the agreement *that tended to suppress or restrain trade* would extend the time period." *Id.* at 1350 (emphasis added).

The court in *Walker* also explained that payments under a Section 371 conspiracy to defraud were different from those in Sherman Act price-fixing conspiracies. It discussed—and distinguished—*United States v. Great W. Sugar Co.*, 39 F.2d 152 (D.C. Neb. 1930), which had held that payment within the statute of limitations did not make actionable illegal contracts that were executed before the statutory period. The *Walker* court said that the statutes were different and that the anticompetitive evils "at which Sherman § 1 was directed" were accomplished when the contracts were signed. 653 F.2d at 1348. The court below said that *Walker* was analogous to the instant case (App. A at 18a), but completely missed its reasoning.

[23] This Court denied certiorari in the *Northern Improvement* case. The Solicitor General had opposed certiorari on the grounds that it was premature (it was before trial and there had been no convictions).

1988) (relying on *Northern Improvement*). Thus, they are wrongly decided and are contrary to the rationale of *Inryco*.[24]

Furthermore, the theory adopted below that contract performance is a continuing crime is inconsistent with other aspects of conspiracy law. It leaves no practical avenue for withdrawal or abandonment either by the successful bidder or by the losers who had "supported" his bid. The winner cannot decide not to perform. *Kelly v. Kosuga*, 358 U.S. 516 (1959) (The fact that an illegal restraint of trade led to a contract does not relieve the contractor from his obligation to perform). Although inaction has generally been held insufficient to constitute abandonment, "supporting" conspirators in bidding markets find themselves in situations where ongoing criminal liability may turn on things over which they have absolutely no control. After the contract is awarded there is no point for the "supporting" bidders to tell the winner that they will no longer cooperate; their role is over. In short, under the court of appeals' construction of continuing conspiracy there is nothing realistic that the alleged conspirators can do to stop committing the allegedly ongoing crime.

The court below's erroneous interpretation of continuing conspiracies led it to sustain *ex post facto* punishment based on a prosecution barred by the statute of limitations.

A. *Dynalectric's And Ewalt's Sentences Violate The* Ex Post Facto *Provisions Of The Constitution*

Although maximum fines of $1 million and $1,000 are prescribed in the Sherman Act, 15 U.S.C. § 1, and for the mail fraud statute, 18 U.S.C. § 1341, respectively, the fines imposed on Dynalectric and Ewalt were sub-

[24] In contrast with *Inryco*, there is no claim here that the joint venture or the alleged "payoff" were anticompetitive—or that any anticompetitive behavior or effect extended past the bid date.

stantially higher.[25] The trial court did not explain its reasoning, but the prosecutor had argued that the "Alternative Fines" provision of the Criminal Fines Improvement Act of 1984, 18 U.S.C. § 3623(c)(1) (Supp. IV 1986) allowed a defendant to be fined up to twice its pecuniary gain from an offense. That law, which by its terms applied only to "offenses committed after December 31, 1984," Pub. L. 98-596 §§ 6(a), 10, 98 Stat. 3136 (1984), was not even enacted until October 1984—more than five years after the alleged bid rigging took place and a year after the joint venture was terminated. Dynalectric and Ewalt did absolutely nothing after that date: they received no payments, did no work, spoke with nobody, did not in any way participate or belong to any conspiracy—and the jury did not find to the contrary. The jury had been instructed that it need only find that "the conspiracy continued at least until September 20, 1981", more than three years before Congress enacted the alternative fines provision.

The enhanced fines are illegal and violate Article I of the Constitution, which prohibits *ex post facto* laws. Art. I, § 9, cl. 3; Art. I, § 10, cl. 1. The *ex post facto* clause specifically outlaws any new statute which "imposes additional punishment to that then prescribed." *Weaver v. Graham*, 450 U.S. 24, 28 (1981), *citing Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325-26 (1867).

Since Dynalectric and Ewalt were sentenced with greater severity under a law that did not exist at the time of the conduct for which they were convicted, the sentences are in direct conflict with the Constitution and precedent of this Court and must be reversed.[26]

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[25] Dynalectric was fined $1,250,000 for the Sherman Act counts and $250,000 for the second mail fraud count. Ewalt was fined $15,000 on the second mail fraud count.

[26] The court of appeals did not address the *ex post facto* issue. Its affirmance presumably rests on its conclusion that an undefined "cooperative silence" by Dynalectric was somehow essential for the conspiracy to continue. App. A at 17a. There was, how-

B. *The Circuit Erred In Ruling That The Results Of The Alleged Conspiracy Made It Continue Within The Statute Of Limitations*

This Court has not ruled on the question of when the statute of limitations is triggered for a criminal single-transaction price-fixing or bid-rigging offense. As noted above, the extent to which cases from other circuits stand for the proposition that contract performance and payment—which have no arguable effect on competition—extend a Sherman Act conspiracy, they are wrongly decided.

Alleging that an "objective" of the conspiracy was to get paid cannot extend its duration. To be illegal, the objective must be one that offends the Sherman Act. All of those were either achieved or abandoned when the bidding closed on September 7, 1979. There was no further "continuous cooperation of the conspirators to keep it [the combination restraining trade] up" after that point. *Fiswick*, 329 U.S. at 216.

The lower court's continuing conspiracy theory converts "fruits" of a conspiracy into its "objectives", and radically extends the period of time and the breadth of exposure to criminal prosecution under the Sherman Act. Moreover, it does so in a manner having no relation to the nature of the conduct, varying solely on the type of contract involved. For instance, if competing banks were to have agreed in January 1955 to fix the interest rate charged on 30-year mortgage loans and they continued to receive monthly payment checks by mail until 1985, they would still be subject to prosecution until 1990—even though their last act of cooperation and the only

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ever, no evidence that activity by Hyman or CCC after December 31, 1984 was dependent on Dynalectric doing anything, silent or otherwise. Dynalectric's (and Ewalt's) silence can at most be construed as an act of concealment which this Court has ruled does not make a conspiracy continue. *Grunewald v. United States*, 353 U.S. at 401-402.

injury to competition occurred 35 years earlier.[27] That makes no sense and is contrary to this Court's teachings in *Toussie v. United States*, 397 U.S. 112, 114-115 (1970):

> The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following *the occurrence of those acts* the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. *For these reasons and others, we have stated before "the principle that criminal limitations statutes are 'to be liberally interpreted in favor of repose'."*

397 U.S. at 114-15 (citation omitted) (emphasis added).[28]

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[27] Similarly, if competing oil companies were to agree on royalty percentages offered to landowners for the life of an oil or gas lease, the statute of limitations might be tolled indefinitely. In contrast, for a price-fixing agreement on the sale of goods, the statute would begin to run immediately on the consummation of the transaction. In each case the nature of prohibited conduct is the same, yet the dates when prosecution would become time-barred would differ wildly.

[28] The court of appeals' decision in the instant case creates an anomaly by construing the criminal statute of limitations more liberally for the prosecution than its civil counterpart. By attempting to distinguish *City of El Paso v. Darbyshire Steel Co.*, 575 F.2d 521 (5th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979)—a case with virtually identical facts—on the grounds that it arose in a civil context, the court of appeals treats the five year criminal statute with *less* repose than its four year civil counterpart, in direct contravention of *Toussie*'s admonition. *See also, Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 119 (1969) (civil statute of limitations runs from time damages are ascertainable; here this would have been no later than the date of the contract award).

It is clear from the record that any "central *criminal* purpose" of the alleged conspiracy was either completed or abandoned when the bids were submitted on September 7, 1979. After that point there was no further continuous cooperation of the conspirators to keep up the combination restraining trade. The statute of limitations ran from that moment.

The facts in this case illustrate precisely why this Court has declared that "the right to be free of stale claims in time comes to prevail over the right to prosecute them" and that "parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents or failure of memory." *United States v. Marion*, 404 U.S. 307, 322 n.14 (1971) (citation omitted). The trial record is rife with examples of how faded memories prejudiced the defendants and were even turned to the prosecutor's advantage. *See* pp. 8-9, *supra*. As noted above, *Toussie* held that in criminal cases the statute of limitations must be liberally construed in favor of repose "to protect individuals from having to defend themselves against charges when the basic facts have become obscured by the passage of time." *Toussie*, 397 U.S. at 114. Here, all of the operative events and the only contested issues of fact related to a brief period of time in 1979—seven years before the indictment was returned. The conduct that Congress sought to prohibit, if it occurred at all, took place in 1979. Thus, both the letter and underlying rationale of the statute of limitations have been violated by the instant prosecution, and will be repeated in future prosecutions if this ruling is allowed to stand.

II. The Circuit Decision Conflicts With Precedent That It Is Reversible Error Not To Instruct The Jury On The Defense Theory

Even if the alleged "payoff" of splitting the profits of the joint venture—which had no arguable effect on competition—could make a conspiracy in restraint of trade a continuing crime, the defendants were deprived

of their statute of limitations defense because the trial court refused to properly instruct the jury on the role of the Paxson-Dynalectric joint venture.[29] It was this joint venture that served as the *sine qua non* for any continued participation by Dynalectric and Ewalt in the "conspiracy," and its supposed illegitimacy was the cornerstone of the prosecution's theory.

This Court and virtually every circuit has declared that instructions must contain an "adequate statement of the law to guide the jury's determination." *United States v. Park*, 421 U.S. 658, 675 (1975). A defendant "is entitled to have presented instructions relating to a theory of defense for which there is *any foundation* in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility." *United States v. Lemon*, 824 F.2d 763, 764 (9th Cir. 1987) (citation omitted) (emphasis added); *United States v. Alvarez*, 755 F.2d 850 (11th Cir. 1985); *United States v. Young*, 464 F.2d 160, 164 (5th Cir. 1972); *Strauss v. United States*, 376 F.2d 416, 419 (5th Cir. 1967). "This rule . . . applies as well to situations where special facts present an evidentiary theory which if believed defeats the factual theory of the prosecution." *Salley v. United States*, 353 F.2d 897, 898 (D.C. Cir. 1965) (citation omitted).

It is reversible error to refuse instructions where "there is *any evidentiary support whatsoever* for the availability of a legal defense, and the Trial Court's attention is specifically directed to that defense." *United States v. Barham*, 595 F.2d 231, 244 (5th Cir. 1979) (emphasis added), *cert. denied*, 450 U.S. 1002 (1981). "The judge must, therefore, be cautious and unparsimonious in presenting to the jury *all of the possible defenses* which the jury may choose to believe." *Strauss v. United States*, 376 F.2d 416 at 419 (emphasis added).

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[29] The instructions requested would have required the jury to find that, to be illegal, the joint venture was agreed to before the bidding or as "consideration" for Dynalectric's bid.

The court of appeals expressly acknowledges petitioners' defense theory: that the joint venture between Dynalectric and Paxson was formed after the bidding and contract award and that "the joint venture was a legitimate one." App. A at 4a. The uncontroverted testimony was that the joint venture was not proposed until after the bidding. Thus, defendants contended that it was not "consideration" to Dynalectric for supporting Paxson's bid as the indictment alleges. Yet the court of appeals makes no attempt to reconcile this finding with the fact that the trial court refused to instruct the jury as to what elements were required for that joint venture to be unlawful.

The profits from the joint venture and the payments to Dynalectric were a major focus of the prosecution's case. It was uncontested that the joint venture continued until November 1, 1983, when the participants executed final releases terminating the arrangement, and its existence after the September 19, 1981 statute of limitations cutoff date was never in dispute. Thus, it was crucial that the jury be properly instructed as to the joint venture's lawfulness and relation to the "conspiracy".[30]

Here, the failure to give the requested instructions amounted effectively to a directed verdict against the defendants on the statute of limitations issue and forced the jury to treat the joint venture itself as a *per se* Sherman Act offense. This is contrary to this Court's ruling in *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979), and is inconsistent with even the Eleventh Circuit's own decision in *National Bancard Corp. v. VISA U.S.A., Inc.*, 779 F.2d 592, 601 (11th Cir. 1986) (joint venture, which is a "contract integration," cannot be adjudged on a *per se* standard because

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[30] Although the prosecutor emphasized the silent nature of the joint venture throughout the trial and argued repeatedly that it was "phony" the court also denied defendant's requested instruction that "the mere fact that a joint venture is silent does not make that joint venture illegal."

"the Sherman Act allows restraints that are necessary to the procompetitive production of a joint venture's product.") The trial judge's refusal to even instruct the jury as to the joint venture flies in the face of *Broadcast Music*'s teaching, and denied defendants their right to have the jury fully and fairly evaluate their defense.[31]

Given the court of appeals' recogntion that the lawfulness of the joint venture was a keystone of the defense and given the monumental importance of the joint venture as the sole link connecting Dynalectric and Ewalt to an alleged continuing conspiracy, the trial court's failure to deliver a correct instruction that addressed this vital aspect of the defense's theory of the case is reversible error. *Strauss*, 376 F.2d at 419; *Barham*, 595 F.2d at 244.[32]

III. The Circuit's Support For Exclusion Of Defense Economic Evidence Creates A Conflict Between Circuits

The defendants attempted to introduce economic evidence to prove that the prices bid by Paxson Electric and Dynalectric were not "artificially high" as alleged in the indictment, and that the profits earned on the Snapfinger job were not excessive, but were instead enhanced by un-

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[31] The trial court's sole mention of the joint venture related exclusively to withdrawal from the mail fraud "scheme" and in that context the court said that "the burden lies with" Dynalectric and Ewalt. Thus, the jury not only lacked guidance as to the predicates necessary to connect the joint venture with the alleged bid rig, but was given an instruction that necessarily assumed that the joint venture was part of an illegal conspiracy and put the burden on the defendants to prove that it was not.

[32] The prejudice from the trial court's treatment of the statute of limitations defense was compounded by the court's charge that "the success or failure of an alleged Sherman Act conspiracy . . . is unimportant." It is patently impossible for an unsuccessful bid rigging conspiracy to continue beyond the time of bids, and the prosecution never contended that an "unsuccessful" conspiracy ever occurred. The trial court nevertheless overruled objections to this instruction.

foreseen economic factors and were reasonable under the circumstances. *See* pp. 10-11, *supra*. This was important to refute prosecution evidence that the prices were high and the profits were unusual. Defendants never argued that the reasonableness of prices was a defense to a conspiracy to fix prices, but offered this evidence from which the jury could infer the *absence* of any price-fixing agreement or overcharge on the Snapfinger project.

The law permits a prosecutor to use evidence of high prices or profit margins as circumstantial proof of the existence of a conspiracy. *American Tobacco Co. v. United States*, 328 U.S. 781, 804-06 (1946); *Estate of Le Baron v. Rohm & Haas Co.*, 506 F.2d 1261, 1263 (9th Cir. 1974). That is precisely what the government did here as part of an effort to support an indictment that alleges in *five* places that Paxson Electric's price was "artificially high" and at a "noncompetitive level".[33] Conversely, the excluded evidence of reasonableness of the price and profits was proof from which the jury could have inferred the *absence* of an agreement to rig the bids.

Whether or not the prosecution uses economic evidence, decisions in other circuits consistently hold that defendants in price-fixing cases are entitled to put on such economic evidence to support their defense, and that its exclusion is reversible error. *Continental Baking Co. v. United States*, 281 F.2d 137 (6th Cir. 1960) (reversing conviction because of excluded economic evidence); *Pevely Dairy Co. v. United States*, 178 F.2d 363 (8th Cir. 1949), *cert. denied*, 339 U.S. 942 (1950) (same); *United States v. Nu-Phonics, Inc.*, 433 F. Supp. 1006, 1014 (E.D. Mich. 1977) (The "court must permit the defendants to produce evidence that tends to [disprove the pricing charges] in the indictment . . . [t]he defendants . . .

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[33] The court of appeals incorrectly stated that the trial court did not allow such use. The government repeatedly emphasized the profits and argued in summation that the defendants did it "for the extra buck."

have the right to establish by any and all relevant evidence that there was no agreement."); *cf. Ohio Valley Elec. Corp. v. General Elec. Co.*, 244 F. Supp. 914, 952 (S.D.N.Y. 1965) (Defendants "certainly must be permitted to introduce evidence—the relevant economic data —in support of [their] position" that uniform price movements "[did] not indicate conspiracy but, rather, are normal independent reactions to economic forces"); *United States v. Chas. Pfizer Co.*, 281 F. Supp. 837, 847 (S.D.N.Y. 1964), *rev'd on other grounds*, 426 F.2d 32 (2d Cir. 1970), *aff'd*, 404 U.S. 548 (1972) ("It is open to those charged with conspiring to fix prices to show that prices were 'reasonable' in respects that tend to show lawful pricing decisions rather than agreement"). Thus, the ruling below denied defendants not only their right to rebut the government's allegations of "artificially high" prices, but also prevented them from proving the absence of a price-fixing agreement through valid economic evidence.

Evidence that the contract price was not "artificially high" was also relevant to rebut the mail fraud charges in the indictment. The indictment alleged that DeKalb County and the EPA were defrauded of money because they were denied the benefit of bids from general contrators "that were not *inflated* by . . . *artificially high* . . . bids." ¶ 20(b) (emphasis added).[34] Significantly, the only justification the court of appeals could find for sustaining the mail fraud charges consistent with *McNally v. United States*, 483 U.S. 350 (1987), was a supposed scheme to "defraud the victims of money." App. A at 26a. As argued below, the "right to free

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[34] In opening argument to the jury, the government argued that DeKalb County and the EPA had been "victimized" by the conspiracy among the defendants. Evidence that Hyman did not pay an "artificially high" price for the electrical work was directly relevant to rebut these charges.

and open competition", Indictment ¶ 23(b), is an intangible right not within the scope of mail fraud under *McNally*.[35] Yet, without proof of any overcharge, there was no money of which DeKalb County and the EPA could have been defrauded. Thus, the court of appeals compounded its error by sustaining the mail fraud convictions solely on the basis of these same one-sided presentations of economic evidence that defendants were never allowed to rebut.

Although the trial court sought to justify its exclusion of defense economic evidence with a finding that there was no evidence of an overcharge, it did not so instruct the jury. Moreover, the court of appeals voluntarily provided a finding to the contrary, stating that the "seemingly high" prices and profits proved the overcharge. App. A at 30a n.19.

Denial of defendants' right to introduce economic evidence probative of the question whether or not the bids were rigged was reversible error. The decision below cannot be reconciled with antitrust rulings in other circuits, or with this Court's ruling in *McNally*.

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[35] The court of appeals "explicitly" declined to rule on this point, finding it unnecessary given the supposed scheme to defraud of money. App. A at 23a n.15.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: February 9, 1989
Washington, D.C.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 87-8451

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DYNALECTRIC COMPANY; PAXSON ELECTRIC COMPANY;
G. W. WALTHER EWALT; WESLEY C. PAXSON, SR.,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Georgia

Nov. 21, 1988

John R. Lowery, Kutak Rock & Campbell, Atlanta, Ga., for Dynalectric and Ewalt.

Emmet J. Bondurant, Bondurant, Mixson & Elmore, Atlanta, Ga., for Paxson.

Rodney O. Thorson, Skadden, Arps, Slate, Meagher & Flom, Washington, D.C., for Dynalectric.

John J. Powers, III, Dept. of Justice, Main Appellate Section, Andrea Limmer, Washington, D.C., for U.S.

James H. Kelley, McGuire, Woods, Battle & Boothe, Washington, D.C., for appellants.

Before RONEY, Chief Judge, and ANDERSON, Circuit Judges and ALLGOOD *, Senior District Judge.

ANDERSON, Circuit Judge:

Defendants Dynalectric Co., Paxson Electric Co., G.W. Walther Ewalt, and Wesley C. Paxson, Sr. appeal from their criminal antitrust and federal mail fraud convictions. Each defendant was convicted of one count of conspiring to violate Section 1 of the Sherman Act, 15 U.S.C. § 1, and two counts of violating the federal mail fraud statute, 18 U.S.C. § 1341. We affirm.

I. FACTS

The corporate defendants in this case, Dynalectric Co. ("Dynalectric") and Paxson Electric Co. ("Paxson Electric"), are electrical contracting companies. The individual defendants, G.W. Walther Ewalt ("Ewalt") and Wesley Paxson, Sr. ("Paxson"), are the presidents of Dynalectric and Paxson Electric, respectively. This case arises from an alleged conspiracy among the defendants and Fischbach & Moore,[1] another electrical contracting company, to rig the bidding on the electrical subcontracting portion of a major construction project at the Snapfinger Creek Wastewater Treatment Plant in Dekalb County, Georgia. Dynalectric, Paxson Electric, and Fischbach & Moore were the only electrical contractors who submitted bids on the Snapfinger project.

In 1982, the Justice Department empaneled several grand juries in the District of Columbia and began a wide-ranging investigation into allegations of bid rigging in the electrical contracting industry. Some records of the Snapfinger project were subpoenaed in 1982. In Sep-

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* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

[1] Fischbach & Moore was named in the same indictment as the defendants but opted to enter a guilty plea prior to trial.

tember, 1984, Paxson testified before the grand jury pursuant to an immunity order. His testimony was that he had never participated in bid-rigging and specifically that the Snapfinger project was not rigged. Following Paxson's exculpatory testimony,[2] the grand jury did not probe further into the Snapfinger contract until Bernard Trepte ("Trepte"), a Fischbach & Moore employee, testified extensively about the Snapfinger bidrigging before the grand jury in October 1985. Subsequently, the Justice Department revived its investigation of the Snapfinger project. As a result of this investigation, the defendants were indicted on September 19, 1986.

The gist of the conspiracy was that the conspirators agreed on their bid prices before they submitted their Snapfinger bids, thereby circumventing the competitive bidding process. The conspirators agreed that Paxson Electric would be the low bidder. Paxson Electric prepared its bid and then notified Dynalectric and Fischbach & Moore what their bids should be. In exchange for their cooperation, Paxson Electric agreed to forgive an $89,000 debt of Fischbach & Moore and to evenly divide the Snapfinger profits with Dynalectric. The defendants characterized the arrangement between Paxson Electric and Dynalectric as a silent joint venture.

The conspiracy was fleshed out when Ewalt, Paxson, and Trepte met in an Atlanta hotel room the evening before the Snapfinger bids were submitted. Trepte and Paxson first came to terms; Trepte originally had pushed for Fischbach & Moore to get the Snapfinger contract but eventually agreed to let Paxson Electric be the low bidder if Dynalectric also agreed to go along with the scheme. Trepte then left the hotel room and was told that if Paxson could convince Ewalt to participate in the bid rigging, he would receive a phone call notifying him

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[2] See note 28, *infra*.

of what Fischbach & Moore's bid should be. Trepte received a call the next day informing him of the bid price. As a consequence of that call, he raised Fischbach & Moore's bid by $500,000.

The bids were submitted on September 7, 1979. Paxson Electric was the low bidder for the electrical subcontracting portion of the Snapfinger project and was awarded the subcontract by the George Hyman Company ("Hyman"), the general contractor who was awarded the overall Snapfinger contract.[3] On the $5 million dollar Snapfinger contract, Paxson Electric made a profit of approximately $1.7 million and paid half of this amount —$880,000—to Dynalectric pursuant to their alleged silent joint venture agreement. Evidence at trial established that Dynalectric did virtually no work on the Snapfinger project, yet received half of Paxson Electric's profits. Paxson Electric made its final payment to Dynalectric in 1983 and received its final payment via mail from Hyman on January 24, 1985.

The defense at trial was that the joint venture was a legitimate one consummated in order to allow Paxson Electric to overcome anticipated minority representation problems in its dealings with Hyman. The defendants contended that the joint venture was not entered until several months after the Snapfinger bidding. They also denied that Ewalt, Paxson, and Trepte had met the evening before the bidding to discuss rigging the bids.

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[3] The subcontract actually was awarded to CCC Electric Co., a minority business enterprise ("MBE") in which Paxson Electric had a 49% ownership interest. However, all the bid preparation work and the submission of the bids was handled by Paxson Electric. Hyman, the general contractor, required the use of an MBE to meet the requirements of the EPA and Dekalb County, who paid for the Snapfinger construction. For convenience in this opinion, we shall refer to Paxson Electric as the company which was awarded the subcontract.

II. DISCUSSION

A. *Statute of Limitations: Criminal Antitrust Conspiracy*

The defendants first challenge the district court's holding that the indictment was not barred by the five year statute of limitations for criminal conspiracies, 18 U.S.C. § 3282. We affirm.

Section 3282 provides that the statute of limitations runs for five years "after [the] offense shall have been committed."[4] The indictment was filed on September 16, 1986. The district court concluded that the antitrust conspiracy was not committed (i.e. completed) until Hyman made the last payment to Paxson Electric in January 1985 and therefore that the indictment was filed well within the five year limitation period. The appellants argue that at the latest, the conspiracy was committed on January 14, 1980, the date on which the contract was entered after the bids were submitted in September 1979. They argue that the payoffs from Paxson Electric to Dynalectric (the last of which were in 1983) and the payments from Hyman to Paxson Electric (the last of which was in January 1985) were results—rather than objectives—of the conspiracy. The task before us is to decide whether the conspiracy to restrain trade was committed when the contract was awarded to Paxson Electric following the submission of rigged bids or whether the conspiracy continued either until Paxson Electric received the last payments under the contract or until Paxson Electric made the last disbursement of the illicit profits to Dynalectric pursuant to the alleged joint venture agreement.

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[4] 18 U.S.C. § 3282 provides that:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

We agree with the district court. The case law, applied to the particular facts of this case, amply supports the district court's conclusion that the payments from Hyman to Paxson Electric, pursuant to the Snapfinger subcontract, and the payments from Paxson Electric to Dynalectric, pursuant to the alleged joint venture agreement, were elements of a continuing conspiracy to restrain trade rather than merely the results of a completed conspiracy.

Our analysis of the relevant cases begin with *United States v. Kissel*, 218 U.S. 601, 31 S.Ct. 124, 54 L.Ed. 1168 (1910), the seminal Supreme Court case interpreting the criminal statute of limitations in the context of an antitrust conspiracy. Justice Holmes, writing for the Court, concluded that a conspiracy can have "continuance in time." 218 U.S. at 610, 31 S.Ct. at 127. Holmes explained that a criminal conspiracy continues in time beyond the initial conspiratorial agreement until the objectives of the conspiracy either are abandoned or succeed. *Id.* Holmes also explained, however, that once the objects of the conspiracy succeed or are abandoned, "the mere continuance of the result of [the] crime does not continue the crime . . . for purposes of the statute of limitations." 218 U.S. at 607, 31 S.Ct. at 126.

To determine the extent to which a conspiracy continues over time, we must determine the objectives of the conspiracy. In any given case, the limits of a conspiracy to restrain trade depend on what the conspirators agreed to do. As the Supreme Court explained in *Grunewald v. United States*, 353 U.S. 391, 397, 77 S.Ct. 963, 970, 1 L.Ed.2d 931 (1957), "the crucial question in determining whether the statute of limitations has run is the scope of conspiratorial agreement for it is that which determines both the duration of the conspiracy and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy." In short, *Kissel* and *Grunewald* teach that a conspiracy con-

tinues until the objectives of the conspiracy succeed or are abandoned and that to determine the objectives of any given conspiracy, the court must look to the conspiratorial agreement.

The relevant contours of a conspiratorial agreement in any given case are those charged in the indictment. *United States v. Northern Improvement Co.*, 814 F.2d 540, 542 (8th Cir.), *cert. denied*, —— U.S. ——, 108 S.Ct. 141, 98 L.Ed.2d 98 (1987); *United States v. Inryco, Inc.*, 642 F.2d 290, 293-94 (9th Cir. 1981), *cert. dismissed*, 454 U.S. 1167, 102 S.Ct. 1045, 71 L.Ed.2d 324 (1982); *United States v. Davis*, 533 F.2d 921, 929 (5th Cir. 1976)[5] ("For purposes of the statute of limitations [18 U.S.C. § 3282] the overt acts alleged in the indictment and proved at trial mark the duration of the conspiracy."); *United States v. Helmich*, 704 F.2d 547 (11th Cir.), *cert. denied*, 464 U.S. 939, 104 S.Ct. 353, 78 L.Ed.2d 317 (1983).[6] Paragraph 18(d) of the in-

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[5] This case was decided prior to the close of business on September 30, 1981, and is binding precedent under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

[6] The appellants contend that the charges raised in the indictment and the evidence presented at trial are irrelevant to a determination of when a Sherman Act conspiracy is completed for purposes of the statute of limitations. They contend that the extent of an antitrust conspiracy is strictly a matter of statutory interpretation of § 1 of the Sherman Act. Section 1 prohibits "every contract, combination, . . . or conspiracy, in restraint of trade or commerce."

We agree that to determine when the limitations period begins to run, it is necessary to interpret the statute which allegedly was violated. However, the purpose of this exercise is to determine whether the conspiracy offense requires an overt act. If an overt act is necessary, then the indictment must charge and the evidence at trial must show that an overt act in furtherance of the conspiracy was made in the limitation period. If an overt act is not required, then the indictment suffices if it charges that the conspiracy continued into the limitations period. As this court explained in *United States v. Coia*, 719 F.2d 1120, 1124 (11th Cir.

dictment clearly alleges that two "substantial terms" of the "continuing agreement" among the conspirators were that Paxson Electric would earn profits on the rigged Snapfinger contract and that it would disburse fifty percent of those profits to Dynalectric in accordance with a silent joint venture agreement.[7] In addition, Paragraph

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1983), *cert. denied*, 466 U.S. 973, 104 S.Ct. 2349, 80 L.Ed.2d 822 (1984):

> [A] conspiracy requiring an overt act is deemed complete for the statute of limitations purposes at the time of completion of the last overt act. This is a rule of statutory construction, rather than a factual determination of whether a conspiracy existed at a particular point in time. With respect to conspiracy statutes that do not require proof of an overt act, the indictment satisfies the requirements of the statute of limitations if the conspiracy is alleged to have continued into the limitations period. The conspiracy may be deemed to continue as long as its purposes have neither been abandoned nor accomplished.

We note that an overt act is not required for a § 1 Sherman Act conspiracy violation. *United States v. A-A-A Electrical Co.*, 788 F.2d 242, 245 (4th Cir. 1986). The instant indictment clearly charged and the evidence presented at trial showed that the receipt of payments under the contract and the sharing of these payments pursuant to the joint venture agreement were objectives of the conspiracy and that the appellants pursued at least some of these objectives until January 1985. Thus, the indictment sets forth a conspiracy that was completed well within the limitations period. Even assuming *arguendo* that an antitrust conspiracy requires overt acts, the payments and payoffs would constitute overt acts made in furtherance of the conspiracy within the limitations period.

[7] Paragraph 18 of the indictment charged:

> 18. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the defendants and coconspirators, the substantial terms of which were that:
>
> (a) defendant Paxson Electric would submit the lowest bid to Hyman and other general contractors for the electrical construction portion of the Snapfinger Creek project;
>
> (b) the defendant companies would submit collusive, artificially high and rigged bids to Hyman and other general con-

17 of the indictment charged that the conspiracy continued through at least January 1985.[8] Thus, it is clear from the indictment that the scope of the conspiratorial agreement specifically encompassed Paxson Electric's receipt of payments under the Snapfinger contract and Dynalectric's receipt of a percentage of these profits in consideration for its participation in the conspiracy, and that the fulfillment of the objectives of the conspiracy continued through January 1985. The indictment, filed in September 1986, therefore was timely.

Every circuit that has addressed this issue has concluded that a criminal conspiracy to restrain trade by collusive, anti-competitive bidding continues for the purposes of the five year statute of limitations until either the final payments are received under the illegal contract or the final distribution of illicit profits among the conspirators occurs. *See United States v. A-A-A Electrical Company*, 788 F.2d 242 (4th Cir. 1986); *United States v. Northern Improvement Co.*, 814 F.2d 540 (8th Cir. 1987); *United States v. Inryco, Inc.*, 642 F.2d 290 (9th Cir. 1981), *cert. dismissed*, 454 U.S. 1167, 102 S.Ct.

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tractors for the electrical construction portion of the Snapfinger Creek project;

(c) in return for defendant Fischbach and Moore's participation in the conspiracy, defendant Paxson Electric would forgive a preexisting debt of $89,330.06; and

(d) in return for defendant Dynalectric's participation in the conspiracy, defendant Paxson Electric would form a silent joint venture with defendant Dynalectric pursuant to which defendant Dynalectric would receve 50 percent of the profits earned from the performance of the electrical construction portion of the Snapfinger Creek project.

[8] Paragraph 17 of the indictment charged:

17. Beginning in or about August 1979 and continuing thereafter until at least January 1985, the exact dates being unknown to the Grand Jury, the defendants and others, known and unknown, engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Title 15, United States Code, Section 1.

1045, 71 L.Ed.2d 324 (1982); and *United States v. Evans & Associates Constr. Co.*, 839 F.2d 656 (10th Cir. 1988). We find the reasoning in these cases persuasive, particularly the analyses of the Fourth Circuit in *A-A-A* and the Eighth Circuit in *Northern Import* [sic].

In *A-A-A*, the appellants submitted collusive bids for an electrical construction project. A federal indictment charging appellants with violating § 1 of the Sherman Act was issued more than five years after the bids were submitted and the contract was awarded but less than five years after appellants received the final payments under the contract and made the final distribution of the illicit profits. Similar to the indictment in this case, the indictment in *A-A-A* charged "that the conspiracy by its terms included the rigging of a bid, the securing of an artificial price for the . . . project, and payoffs to the coconspirators who helped secure the project." 788 F.2d at 245.

The *A-A-A* appellants argued that the conspiracy was complete when they submitted the bids and that the payments received and the payoffs made did not restrain trade and thus were irrelevant for determining when the statute of limitations began to run. *Id.* at 244. The Fourth Circuit rejected both of these arguments. The court held that a criminal conspiracy to restrain trade should be treated the same as any other criminal conspiracy for purposes of determining the limitation period. *Id.* at 245. The court recognized that a § 1 Sherman Act violation can occur without any overt act, and hence that a party could suffer "legally cognizable harm" before any overt acts took place. However, the court emphasized that as with any criminal conspiracy, the relevant date in the statute of limitations analysis is the date on which the last overt act in furtherance of the conspiracy is made, *not* the date on which a party suffers "legally cognizable harm." *Id.* Hence, although the payments and payoffs were not necessary elements of a

criminal antitrust conspiracy to restrain trade, they constituted overt acts made in furtherance of the conspiracy.[9]

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[9] One of appellants' arguments is that a continuing conspiracy to violate the Sherman Act does not exist unless there is a continuing substantive antitrust violation. In other words, appellants argue that to be a part of a continuing conspiracy, the payments themselves must be illegal acts, i.e., in restraint of trade. If the payments themselves are not in restraint of trade then appellants conclude that the conspiracy to restrain trade ends when the contract is awarded.

We accept *arguendo*—but explicitly do not decide—appellants' argument that the restraint of trade ended when the contract was awarded. However, we do not believe that the conspiracy is as narrowly circumscribed. The indictment clearly alleged that the appellants conspired and agreed to submit collusive bids on the Snapfinger project, to receive payments from Hyman pursuant to the contract, and to divide the payments under the alleged joint venture agreement. The cases are clear that all acts which are part of an illegal conspiarcy do not themselves have to be illegal.

For example, in *United States v. Helmich*, 704 F.2d 547 (11th Cir.), *cert. denied*, 464 U.S. 939, 104 S.Ct. 353, 78 L.Ed.2d 317 (1983), the defendant was convicted of conspiracy to commit espionage. He transmitted classified information in 1964 to the Soviet Union and attempted to collect his compensation from the Soviets in 1980. He was indicted in 1981. Helmich argued that the indictment was barred by the five-year statute of limitations for criminal conspiracies because the transmittal of defense information was the only substantive crime under the espionage statute. He argued that getting paid for his efforts was not illegal, thus the 1980 collection attempt could not be the subject of a prosecution for conspiracy to commit espionage. *Id.* at 549. The court rejected this argument, explaining that "the legal as well as the illegal aspects of an agreement are all part of a conspiracy to commit an illegal act for statute of limitations purposes." *Id.; see also United States v. Mennuti*, 679 F.2d 1032, 1035-36 (2d Cir. 1982) (Conspiracy to commit mail fraud continued until the conspirators received their payoffs, even though the payoffs themselves were not illegal under the mail fraud statute. Thus, the five-year statute of limitations was not violated when the substantive mail fraud offense was committed in December 1975, the payoff was received in July 1976, and the indictment was returned in February 1981.); *United States v. Walker*, 653 F.2d 1343, 1348-50 (9th Cir. 1981), *cert. denied*, 455

The court also concluded that securing payments under the contract and making payoffs to fellow conspirators "were necessary to the successful consummation of the bid-rigging agreement," *id.*, i.e. were necessary objectives of the agreement, and that therefore under *Kissel* and *Grunewald* the statute of limitations did not begin to run until these objectives succeeded or were abandoned.

In *Northern Improvement*, the appellants submitted bids on several municipal improvement projects. Rather than agreeing that one of the appellants would submit the low bid on each of the three contracts and thereafter share the profits with the other conspirators, the appellants arranged the bids so that each conspirator was the low bidder on one project. Consequently, the conspirators did not divide the profits each made on its particular

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U.S. 908, 102 S.Ct. 1253, 71 L.Ed.2d 446 (1982) (In a § 371 prosecution for conspiracy to defraud the government by bid rigging a timber sale, the conspiracy continued for statute of limitations purposes until the profits were received and divided among the conspirators, even though the contract was awarded outside the statute of limitations.); *Koury v. United States*, 217 F.2d 387, 388 (6th Cir. 1954) ("A conspiracy is not ended by the illegal transportation of a stolen car when the fruits of the transportation are yet to be obtained and divided by the conspirators."); *United States v. Xheka*, 704 F.2d 974, 987 (7th Cir.), *cert. denied*, 464 U.S. 993, 104 S.Ct. 486, 78 L.Ed.2d 682 (1983) (18 U.S.C. § 371 conspiracy to destroy building with explosives continued after the building was destroyed until conspirators either received the economic benefits (insurance proceeds) that motivated the crime or abandoned their claim).

The *Helmich* court distinguished *Grunewald* on the same basis as we do in this opinion: the concealment efforts in *Grunewald* were not an objective of the conspiratorial agreement, whereas the compensation Helmich received from the Soviets clearly was part of a conspiratorial agreement to commit espionage, even though the payments were not received until sixteen years after he actually spied for the Soviets. Analogously in this case, even if we assume that the contract payments and the payments made pursuant to the joint venture agreement were not in restraint of trade, they clearly were objectives of the conspiracy to restrain trade. Thus, the statute of limitations did not begin to run until these objectives were achieved or abandoned.

contract. The indictment was filed within five years after the appellants received the final payments under the contracts but more than five years after the bids were submitted and the contracts awarded.

The district court concluded that the conspiracy terminated when the bids were submitted, in part because "there was no sharing of spoils after the payments on the contracts. . . ." 814 F.2d at 541. The Eighth Circuit reversed. After noting the indictment plainly charged that the appellants agreed to rig the bids " 'with the expectation that [the agreed upon] low bidder would be awarded the project and paid by the city awarding the project . . .,' " the Eighth Circuit reasoned that receipt of payments—in addition to rigging the bids—was a central purpose of the conspiracy to restrain trade. *Id.* at 542, quoting the indictment. The court also held that the unilateral receipt of payments under the contract was an overt act which furthered the conspiracy, regardless of the fact that there were no payoffs from the illicit profits. *Id.* at 543 n. 1.

We now turn to the specific arguments which appellants raise in this appeal, many of which were addressed and rejected by the four circuits that previously have considered this corner of the law.

Appellants primarily rely on *City of El Paso v. Darbyshire Steel Co.*, 575 F.2d 521 (5th Cir. 1978), *cert. denied*, 439 U.S. 1121, 99 S.Ct. 1033, 59 L.Ed.2d 82 (1979). *Darbyshire* is a civil antitrust case involving a virtually identical bid rigging conspiracy in which the court had to determine when the civil statute of limitations, 15 U.S.C. § 15b, began to run. The civil statute of limitations provides that a civil antitrust action must be brought within four years after the cause of action accrues.[10] The *Dar-*

[10] 15 U.S.C. § 15b provides in pertinent part:

> Any action to enforce any cause of action under sections 15, 15a or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. . . .

byshire court held that in a bid rigging case, a civil antitrust cause of action accrues when the contract is executed; at that point, the plaintiff's damages are fixed and ascertainable. *Id.* at 523.

The appellants assert that the requirement that damages must be ascertainable before the civil statute of limitations begins to run is a requirement above and beyond the criminal limitations requirement that the conspiracy must be completed. In other words, appellants contend that in a civil antitrust case, the conspiracy must be completed *and* the plaintiff's cause of action must have accrued before the statute of limitations begins to run. Therefore, they contend that the court's holding in *Darbyshire* necessarily means that the conspiracy was completed when the contract was executed. Appellants offer no cases supporting their interpretation of *Darbyshire*, i.e., that a civil antitrust cause of action cannot accrue before the conspiracy is completed. We note that this interpretation directly conflicts with the Fourth Circuit's decision in *A-A-A* that the criminal antitrust "statute of limitations begins to run, not from the date of the legally cognizable harm, but from the date of the last overt act." 788 F.2d at 245; *see* discussion of *A-A-A*, *supra*.

We conclude that *Darbyshire* is not helpful in this case because it does not involve an interpretation of the appropriate statute of limitations. The requirement that a cause of action accrue in a civil antitrust case before the statute of limitations begins to run is separate and distinct from—not cumulative to—the requirement in a criminal antitrust case that the statute of limitations begins to run when the conspiracy is completed. As the Fourth Circuit explained in *A-A-A:*

> We reach this conclusion [that a conspiracy to restrain trade encompasses receipt of payments for purposes of the criminal statute of limitations] mindful of the fact that the . . . statute of limita-

> tions . . . for civil antitrust actions begins to run at the time the antitrust cause of action accrues and that the continued receipt of payments may not constitute a continuing violation of the antitrust laws for civil statute of limitations purposes. . . . The present case, however, is . . . [not controlled by the civil statute] but by an entirely different statute governing the limitations period for criminal conspiracies, including those of a continuing nature.

788 F.2d at 246 n. 4.

Moreover, nothing in *Darbyshire* addressed the duration of the conspiracy. The *Darbyshire* court did *not* hold that the cause of action accrued and the statute of limitations began to run *because* the conspiracy was complete nor did *Darbyshire* explicitly or implicitly hold that civil damages could not be ascertained before the conspiracy terminated. Thus, we agree with the government that accrual of a cause of action for civil statute of limitation purposes and completion of the conspiracy for criminal statute of limitations purposes are two entirely different and distinct issues.

The appellants also contend that the primary objective of a conspiracy to restrain trade in a § 1 Sherman Act case is the restraint of trade itself and that after the rigged bids are accepted, the restraint of trade ends. They argue that the payments received under the Snapfinger subcontract are results of the conspiracy, rather than objectives of the conspiracy.

We disagree. It is inconceivable to us that any business would conspire to restrain trade solely for the sake of restraining trade; the attendant battery of civil and criminal penalties for antitrust violations simply is too threatening to convince us that anybody would attempt to restrain trade without also having the further goal of financial self-enrichment by virtue of the restraint of trade. We believe that a central objective of a conspiracy

to restrain trade is to garner illicit profits. We find persuasive the Eighth Circuit's explanation of the objectives of a criminal conspiracy to restrain trade through collusive bidding:

> We do not deal here with criminal behavior that is an end in itself. Common sense tells us that the conspirators' purpose was to reap the benefit of the conspiracy: to be awarded public improvement contracts at anti-competitively high prices and to be paid for those contracts. . . . [T]he object and purpose of [the] illegal agreement [to collusively rig bids] was 'illicit gain,' the receipt of payments, and we conclude that the district court erred in holding that the purpose of the conspiracy terminated the moment the bids were submitted.

Northern Improvement, 814 F.2d at 542. *See United States v. Rodgers*, 624 F.2d 1303, 1310 (5th Cir. 1980) (a bidrigging scheme "would have been meaningless, incomplete, and futile without final award and payment. . . ."), *cert. denied sub nom., Anthony J. Bertucci Constr. Co. v. United States*, 450 U.S. 917, 101 S.Ct. 1360, 67 L.Ed.2d 342 (1981). Therefore, we reject the appellants' argument that receiving payments under the contract or distributing illicit profits among the conspirators cannot as a matter of law be an objective of a conspiracy to restrain trade. The conspiracy continues so long as one or more of the conspirators continues to receive payments under a collusive contract—i.e. as long as they continue to realize a central and obvious objective of the conspiracy.

We also disagree with the appellants' contention that the joint conspiratorial action necessary for a conspiracy ended when they submitted the rigged bids. The continued cooperation of Paxson Electric and Dynalectric was evident in two respects long after the bids were submitted in early 1980. Paxson Electric divided the illicit

profits with Dynalectric pursuant to the joint venture agreement. The final payment to Dynalectric was made in 1983, well within the five-year limitation period. At least from Dynalectric's perspective, these payments were a crucial element of the jointly conceived and executed conspiratorial plan; these payments would not have occurred if the parties had ceased to cooperate.

Continued cooperation tacitly was evidenced by Dnyalectric's silence after it had received its final payoffs under the joint venture agreement. Dynalectric's silence was necessary if the conspiracy was to be successfully carried to fruition, i.e., if Paxson Electric was to receive all of its illicit profits via receipt of the subcontract payments from Hyman.

The appellants argue that the payments from Paxson Electric to Dynalectric and Dynalectric's silence after it received the final payment under the joint venture agreement constitute efforts to conceal the completed crime. In *Grunewald*, the Supreme Court held that conspirators' efforts to conceal their actions after they had accomplished the objectives of the conspiracy were not part of the overall conspiracy. 353 U.S. at 402, 77 S.Ct. at 972. The Supreme Court carefully limited its holding to cases involving concealment of the illegal activities *after* the main objectives of the conspiracy were accomplished. The court pointed out the difference between concealment done in furtherance of the objectives of the conspiracy, such as kidnappers hiding out until they receive the ransom or car thieves repainting a stolen car, and concealment done to cover up the crime itself, such as kidnappers covering their tracks after they had received the ransom. 353 U.S. at ——, 77 S.Ct. at 974.

The payments Paxson Electric made to Dynalectric were important objectives of the conspiracy, rather than "hush money" paid to conceal a completed crime. Thus, our conclusion that these payments continued the con-

spiracy is not at odds with *Grunewald*. An analogous case is *United States v. Walker*, 653 F.2d 1343 (9th Cir. 1981), *cert. denied*, 455 U.S. 908, 102 S.Ct. 1253, 71 L.Ed.2d 446 (1982). In *Walker*, the defendant defrauded the government by submitting collusive bids and later splitting the illicit profits with the other conspirators, in violation of 18 U.S.C. § 371. The Ninth Circuit concluded:

> We do not agree with [the defendant] that the acts of contract performance and division of profits are analogous to coverup activities and thus barred by *Grunewald*. However, even if we were to accept this tortured analogy and apply the *Grunewald* test, those acts formed part of the conspiracy because they did not *follow* the accomplishment of its central criminal objectives but rather were acts in *furtherance* of those aims, viz, obtaining and dividing the excess profits made on the timber. [Defendant's] definition of the objective of the conspirators as limited to obtaining the award from the Forest Service is far too narrow.

Id. at 1348 (emphasis in original). The *Walker* court also noted that "[w]ithout the continuing cooperation of his co-conspirators, bought by the payoffs to them in various forms, the scheme would have fallen apart." *Id.* at 1347.

We also believe that Dynalectric's cooperative silence from 1983, when it received its final payment under the joint venture agreement, to 1985, when Paxson Electric received its final payment from Hyman, is akin to the kidnapper awaiting the ransom or the car thief repainting the car. In other words, Dynalectric's continued tacit cooperation was necessary to the "successful accomplishment of the crime." *Grunewald*, 353 U.S. at 405, 77 S.Ct. at 974; *A-A-A*, 788 F.2d at 245.

As a final matter, we note that if we were to adopt the appellants' argument that the conspiracy concludes when the contract is awarded following the rigged bidding, we would effectively eliminate the difference that the Sherman Act explicitly makes between *contracts* and *conspiracies* in restraint of trade. We conclude that a conspiracy to restrain encompasses more than a contract in restraint of trade. The distinction between a contract in restraint of trade and a conspiracy in restraint of trade was explicitly noted by the Supreme Court in *Kissel* where Justice Holmes wrote that "[a] conspiracy in restraint of trade is different from and more than a contract in restraint of trade." 218 U.S. at 608, 31 S.Ct. at 126. Therefore, we reject the appellants' interpretation of the Sherman Act that makes its provisions redundant.

B. *Mail Fraud Claims*

We turn next to defendants' challenges to their mail fraud convictions. Each defendant was convicted of two counts of mail fraud. The basis of each mail fraud count was a payment check mailed from Hyman to Paxson Electric.

1. McNally claim

First, defendants mount a challenge based on *McNally v. United States*, —— U.S. ——, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987). The federal mail fraud statute makes it illegal to use the mails to execute a scheme to defraud a person or entity of money or property. 18 U.S.C. § 1341.[11] In *McNally*, the Supreme Court held that the mail fraud statute did not apply to schemes to

[11] 18 U.S.C. § 1341 provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do . . . [uses the mails or causes them to be used,] shall be fined . . . or imprisoned . . . or both.

defraud citizens of their intangible right to honest government.[12] Subsequently, in *Carpenter v. United States*, —— U.S. ——, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987), the Supreme Court clarified that the mail fraud statute did apply to schemes to defraud a victim of intangible *property* rights. *See United States v. Italiano*, 837 F.2d 1480 (11th Cir. 1988) (extensive discussion of *McNally* and *Carpenter* and the ramifications of these cases on the application of the mail fraud statute).

The rule of law we discern from *McNally* and *Carpenter* is that the only fraudulent schemes exempt from the mail fraud statute are those involving intangible, non-property, non-monetary rights (hereinafter "McNally-type intangible" rights). Put another way, *McNally* and *Carpenter* teach that the mail fraud statute applies to any fraudulent scheme involving a monetary or property interest, whether that interest is tangible or intangible. *See United States v. Asher*, 854 F.2d 1483 (3d Cir. 1988) ("Essentially, therefore, where rights are involved whose violation would lead to no concrete economic harm, and where those rights are the only rights involved in the case, *McNally*'s proscriptions would prevent upholding conviction on appeal. Where, on the other hand, a violation of the rights involved would result in depriving another of something of value, and the indictment, the proofs and the instructions are based on that fact, then the presence of intangible rights language will not prove fatal on appeal."); *United States v. Wellman*, 830 F.2d 1453, 1462 (7th Cir. 1987) (*McNally* addressed "rights whose violation would ordinarily result in no concrete economic (or to use Justice Stevens' term, 'mone-

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[12] In our discussion of the applicability of the mail fraud statute to schemes to defraud various types of rights (i.e., monetary or non-monetary, property or non-property, tangible or intangible), we recognize that in all cases the government also must prove an appropriate use of the mails to obtain a conviction under the mail fraud statute.

tary') harm."); *United States v. Baldinger*, 838 F.2d 176, 179 (6th Cir. 1988) (From *McNally* and *Carpenter*, the Sixth Circuit concluded that the Supreme Court "clearly intended to exclude from the reach of the mail fraud statute claims which did not involve a direct intention to deprive another of a recognized and traditional property right (tangible or intangible) . . . .").

Defendants contend that a scheme to defraud the EPA and Dekalb County of their right to free and open competition falls within the bounds of *McNally;* hence, they assert their mail fraud convictions are infirm. In the plethora of post-*McNally* cases addressing challenges to pre-*McNally* mail fraud convictions, the courts uniformly have looked to the wording of the indictment and the jury instructions to determine if the convictions can stand. If the indictment and jury instructions were phrased in such a way that the jury *could* have convicted the defendant of scheming to defraud the victim of a *McNally*-type intangible right, the courts have reversed the convictions.[13] Conversely, if the jury necessarily *must*

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[13] *See United States v. Alexander*, 850 F.2d 1500, 1503 (11th Cir. 1988) (jury was instructed that the alleged fraudulent scheme had three objectives, one of which was " 'to fraudulently deprive the citizens of a county of their right to have the county's business conducted honestly . . .' " and that to convict the defendants of mail fraud, " 'you [the jury] need only to find that the scheme sought to achieve only one of these objectives. . . .' " (quoting the jury instructions)); *United States v. Conover*, 845 F.2d 266, 268-71 (11th Cir. 1988) (In the context of a kickback scheme, mail fraud convictions were reversed where the indictment did not charge nor did the instructions require the jury to find that the defendants schemed to defraud the victim of money or property.); *United States v. Italiano*, 837 F.2d 1480, 1487 (11th Cir. 1988) (mail fraud conviction vacated where the indictment failed to allege a scheme to defraud the victim of money or property and where "the jury instructions served only to exacerbate, rather than ameliorate, the infirmities which permeated the indictment."); *United States v. Covino*, 837 F.2d 65, 71-72 (2d Cir. 1988) (government's theory of mail fraud, as alleged in the indictment and charged to the jury, was that the defendant

have concluded that the defendant schemed to defraud the victim of a non-*McNally* type of right (i.e. a monetary or property right, whether tangible or intangible),

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employee breached a fiduciary duty to his employer by accepting kickbacks and by failing to inform the employer of the kickbacks. The court reversed the convictions, explaining that "the indictment and charge in the instant matter neither alleged nor asked the jury to find that [the victim] was defrauded of money or property."); *United States v. Baldinger*, 838 F.2d 176 (6th Cir. 1988) (where defendant challenged his mail fraud conviction solely on the sufficiency of the indictment, the court found a *McNally* violation where the indictment alleged solely that the defendant devised a scheme to defraud the victims of "their right to conduct business free of false, fictitious and fraudulent information. . . ."); *United States v. Holzer*, 840 F.2d 1343, 1345-46 (7th Cir.) (conviction reversed where indictment alleged defendant judge's receipt of bribes from lawyers appearing before him was a scheme to defraud Illinois and its citizens of "the right to the administration of justice by an honest judge" and the jury was instructed that it needed to find a plan to deprive the victims of something of value and that "[t]he thing of value that the Government says was lost here is what the lawyers call intangible rights."), *cert. denied*, —— U.S. ——, 108 S.Ct. 2022, 100 L.Ed.2d 608 (1988); *Ingber v. Enzor*, 841 F.2d 450 (2d Cir. 1988) (conviction overturned where jury was charged on the alternative grounds that defendants devised a scheme to defraud the victims of money or property *or* to defraud them of their right to a fair and free election); *United States v. Murphy*, 836 F.2d 248, 250-54 (6th Cir. 1988) (although the jury was instructed that it could convict the defendants of mail fraud if they concluded that the defendants devised a scheme to defraud the victims of money, the convictions were reversed because the jury instructions improperly broadened the allegations of the indictment, which only alleged a scheme to defraud the victims of *McNally*-type intangible rights); *United States v. Ochs*, 842 F.2d 515 (1st Cir. 1988) (Although the indictment alleged that the defendants schemed to defraud the victims of both tangible and intangible rights, the conviction was reversed because the jury was explicitly instructed that " 'You do not have to find that the City actually lost money because of this scheme. It is sufficient if you find that the scheme did defraud or deprive the public of an intangible or political or civil right, such as the right to honest government. . . .' "); *United States v. Shelton*, 848 F.2d 1485 (10th Cir. 1988) (en banc) (convictions reversed either because the indictment expressly charged only a violation of

then the convictions stand, even if the indictment charged and the jury was instructed on *McNally*-type intangible rights in addition to non-*McNally rights*.[14] *See United States v. Ochs*, 842 F.2d 515, 522-24 (1st Cir. 1988) and *United States v. Asher*, 854 F.2d 1483 (3d Cir. 1988) (summarizing leading post-*McNally* mail fraud cases).

The defendants' *McNally* claim only can succeed if the jury could have convicted them of scheming to defraud the EPA and Dekalb County of their right to open competition and if this intangible right to open competition falls within the scope of *McNally*.[15] Based on the indict-

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McNally-type intangible rights or, where the indictment charged a deprivation of both tangible and *McNally*-type intangible rights, the instructions did not require the jury to base a guilty verdict in whole or in part on the tangible rights theory); *United States v. Stack*, 853 F.2d 436 (6th Cir. 1988) (although indictment charged a scheme to defraud victim of "'right to have business conducted honestly . . . *and* to obtain money by . . . false and fraudulent pretenses . . .'", mail fraud convictions were reversed because jury was instructed that "'[a]ny actions designed to deprive an employer of his right to have his business conducted honestly . . . may constitute a fraud within the meaning of the mail fraud statute . . .,'" and thus could have convicted defendants solely on a *McNally*-type intangible rights theory. (emphasis added)).

[14] *See United States v. Eckhardt*, 843 F.2d 989 (7th Cir. 1988); *United States v. Fagan*, 821 F.2d 1002 (5th Cir. 1987), *cert. denied*, —— U.S. ——, 108 S.Ct. 697, 98 L.Ed.2d 649 (1988); *New York v. Hendrickson Brothers, Inc.*, 840 F.2d 1065, 1082 (2d Cir. 1988) (holding in bid rigging context that mail fraud conviction withstood *McNally*); *United States v. Horton*, 847 F.2d 313 (6th Cir. 1988); *United States v. Lance*, 848 F.2d 1497 (10th Cir. 1988) (en banc); *United States v. Perholtz*, 836 F.2d 554 (D.C. Cir. 1987); *United States v. Piccolo*, 835 F.2d 517 (3d Cir. 1987); *United States v. Richerson*, 833 F.2d 1147 (5th Cir. 1987); *United States v. Runnels*, 833 F.2d 1183 (6th Cir. 1987); *United States v. Wellman*, 830 F.2d 1453 (7th Cir. 1987); *United States v. Asher*, 854 F.2d 1483 (3d Cir. 1988).

[15] Because we hold that this jury must have found that the defendants schemed to defraud the EPA and Dekalb County of money, we explicitly do not decide whether the intangible right to

ment and the jury instructions, we conclude that the jury must have convicted the defendants of scheming to defraud the victims of money, thus we reject their *McNally* claim.[16]

a. *Indictment*

The indictment charged that:

> 23. Beginning in or about August 1979 and continuing thereafter until at least January 1985, the exact dates being unknown to the Grand Jury, the defendants and co-conspirators devised and intended to devise a scheme and artifice to defraud the County

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free and open competition is a *McNally*-type intangible right. We also do not reach the question of whether the intangible right to open competition is "inextricably intertwined" with tangible monetary interests and therefore outside the scope of *McNally*. *See, e.g., United States v. Lance*, 848 F.2d 1497, 1501 (10th Cir. 1988) (en banc) (where the government presented adequate evidence of "split deal" scheme in which the defendant billed his employer for nonexistent purchases and pocketed the payment, the court concluded that the alleged deprivation of the employer's intangible right to good government was "inextricably intertwined" with a tangible monetary loss and affirmed mail fraud conviction); *United States v. Wellman*, 830 F.2d 1453, 1463 (7th Cir. 1987) (court looked to "the nature of the scheme," as established by the proof presented at trial, to determine if there was a *McNally* violation); *United States v. Washita Construction Co.*, 789 F.2d 809, 818 (10th Cir. 1986) (in pre-*McNally* mail fraud case involving bid-rigging, the Tenth Circuit concluded that a collusive bidding scheme was the valid basis for a mail fraud conviction because it "deprived taxpayers of the monetary advantage of competitive bidding. . . .").

[16] Our conclusion comports with the result in *State of New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065 (2d Cir. 1988), which is the only case we are aware of in which a court addressed a *McNally* challenge to a mail fraud conviction. In *Hendrickson Bros.*, the Second Circuit concluded that *McNally* was not pertinent to mail fraud convictions stemming from bid-rigging scheme because "the indictments alleged that the scheme was to defraud the agencies, not to corrupt them, and the jury was instructed accordingly." *Id.* at 1082.

and the United States of America, through its agency, the EPA, of:

(a) money; and

(b) their right to free and open competition for the bidding on the electrical construction portion of the Snapfinger Creek project, such bidding to be conducted honestly, fairly and free from craft, trickery, deceit, corruption, dishonesty and fraud.

24. It was part of the aforesaid scheme and artifice to defraud that the defendants, and others, known and unknown to the Grand Jury, would and did submit collusive, artifically high and rigged bids in order to induce the general contractor selected to build the Snapfinger Creek project to award the subcontract for the electrical construction portion of the project to defendant Paxson Electric.[17]

The plain language of the indictment charges the defendants with scheming to defraud the EPA and Dekalb County of *money*. While it also charges that the defendants schemed to defraud the victims of their right to open competition, the indictment is not worded in a way that would allow the jury to choose between the two

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[17] The indictment further charged that:

25. On or about the dates of mailing set forth below, for the purpose of executing and carrying out the scheme and artifice to defraud, and attempting to do so, the defendants and others did knowingly cause the two checks listed below to be delivered by mail by the United States Postal Service according to the directions thereon, to an address within the Northern District of Georgia, each such use of the mails constituting a separate count of this indictment and a separate violation of Title 18, United States Code, Section 1341. . . .

The two mailings which were the basis for the two mail fraud counts were payments mailed from Hyman, the general contractor, to CCC Electric Co., the MBE subcontractor affiliated with Paxson in response to bids mailed from CCC Electric Co. to Hyman. The payments were mailed on May 24, 1984, and January 24, 1985.

theories. Rather, to convict the defendants in accordance with the indictment, the jury must have concluded that there was a scheme to defraud the victims of money *and* the right to open competition. *See United States v. Perholtz*, 836 F.2d 554, 559 (D.C. Cir. 1988) (holding indictment was sufficient under *McNally* where it alleged defendants created a kickback scheme to defraud the victim of its " 'lawful right to conduct business and affairs free from kickbacks . . .' " and "*also*—not alternatively —one 'to obtain money and property . . . .' " (quoting indictment) (emphasis in original)); *United States v. Eckhardt*, 843 F.2d 989, 996-97 (7th Cir. 1988) (mail fraud conviction entered pursuant to plea agreement upheld where the indictment alleged a scheme to defraud the victim of intangible rights *and* "to obtain money and property by false and fraudulent pretenses.").

In *McNally*, the indictment charged that defendants schemed to defraud the government and citizens of Kentucky of "their right to have the Commonwealth's affairs conducted honestly . . . ." —— U.S. at —— n.4, 107 S.Ct. at 2878 n. 4. The indictment also charged that the defendants schemed to "obtain (directly and indirectly) money . . ." but did not allege that they schemed to defraud the *victims* of money. Thus, the *McNally* indictment was substantially different from the one in this case.

b. *Jury Instructions*

The jury instructions also withstand a *McNally* challenge. We note that in reviewing the sufficiency of the jury instructions, we must examine the charge as a whole rather than isolating and examining the deficiencies of individual instructions. *Italiano*, 837 F.2d at 1487; *United States v. Gordon*, 817 F.2d 1538, 1542 (11th Cir. 1987), *vacated in part and rev'd in part*, 836 F.2d 1312 (11th Cir. 1988). Our review of the instructions as a whole convinces us that a reasonable jury must have concluded that the purpose of the scheme was to defraud the

victims of money. The jury was instructed that to convict the defendants of mail fraud, the government had to prove beyond a reasonable doubt that, among other things, "the defendant knowingly and willfully devised a scheme to defraud . . . ." (R. 24-3326). The judge instructed that a "scheme includes any plan or course of action intended to deceive others *and* to obtain by false or fraudulent pretenses *money or property* from the person so deceived." *Id.* (emphasis added). This is directly contrary to *McNally*, where the court stated that "there was no charge and the jury was not required to find that the Commonwealth itself was defrauded on any money or property." —— U.S. at ——, 107 S.Ct. at 2882.

Of equal importance is that the jury was *not* instructed on the intangible rights theory. *No* instruction was given that the scheme to defraud could include the right to open competition. This aspect of the scheme was implicit in the instruction that the government had to prove a scheme to defraud "substantially the same as the one alleged . . ." in the indictment. (R. 24-3327). As discussed above, however, the scheme alleged in the indictment was one to defraud the victims of money *and* the right to open competition. Thus, the implicit reference to the right to open competition is not in violation of *McNally*. *See Perholtz*, 836 F.2d at 558 (where the indictment charged a scheme to defraud the government of money and its right to conduct its business free from kickbacks and the jury was instructed that to convict it had to find a scheme "substantially the same as the one alleged in the indictment," there was no *McNally* violation even though the judge explicitly charged the jury that the scheme to defraud included the deprivation of *McNally*-type intangible rights); *United States v. Piccolo*, 835 F.2d 517, 520 (3d Cir. 1987) (defendant's *McNally* claim rejected where the jury was charged that to convict it must find that defendant schemed to defraud the victim " 'of its right to the honest, faithful and loyal

services of its employee, . . . *and further, to defraud* [victims] *of money.*'" (emphasis in original)), *cert. denied*, —— U.S. ——, 108 S.Ct. 2014, 100 L.Ed.2d 602 (1988); *United States v. Asher*, 854 F.2d 1483 (3d Cir. 1988) (although jury instructions made reference to a scheme to defraud of both tangible rights and *McNally*-type intangible rights, convictions affirmed where court was "unable to hypothesize a set of circumstances under which this jury could have found [defendant] guilty of depriving the citizens of the Commonwealth of their right to honest government . . . without also having found that [defendant] was involved in a scheme, the sole purpose of which was to ensure that CTA obtained a no-bid . . . contract at a substantially greater cost to the Commonwealth than a contract obtained through traditional competitive bidding.").

The defendants contend that the jury instructions are invalid under *McNally* because they do not expressly limit the fraudulent scheme to the deprivation of money and do not expressly exclude a scheme based on the deprivation of the right to open competition. For example, the defendants argue that the charge defining the "scheme", quoted above, is defective because it does not absolutely limit a mail fraud scheme to the deprivation of property but rather explains that a scheme *includes* a deprivation of tangible rights. Two other circuits have addressed *McNally* challenges to identical jury instructions defining "scheme". The Tenth Circuit agreed with the defendants, concluding that "[a]lthough the above definition of 'scheme' states that it *includes* any plan by which the victim loses money or property, use of the open-ended word 'includes' does not *require* the jury to find such a loss." *United States v. Shelton*, 848 F.2d 1485, 1496 (10th Cir. 1988) (en banc) (emphasis in original).

The Sixth Circuit reached the opposite conclusion. It explained that the instruction defining "scheme" was ac-

ceptable because "[t]he clear emphasis on deprivation of money or property, combined with the absence of any instruction that the jury was free to convict Horton on the basis of the deprivation of Chrysler's intangible right to conduct its business in an honest manner compels the conclusion that *McNally* does not control the disposition of the present case." *United States v. Horton*, 847 F.2d 313, 320 (6th Cir. 1988). Under the facts of this case, we agree with the Sixth Circuit that the definition of "scheme", although somewhat open-ended, does not require a reversal of the mail fraud convictions. As in *Horton*, the jury here was *not* instructed on any intangible right theory. Moreover, it is clear to us that the focus of the jury charge, read as a whole, was on the deprivation of money and property, not on the deprivation of the right to free and open competition. Finally, in this case, the only mention of the open competition theory was in the indictment, and there it was clear that there must be a scheme to defraud of both money *and* open competition.

For these reasons, we reject defendants' claim to the extent it is based on *McNally*.

2. Sufficiency of the Evidence

In reviewing a defendant's challenge to the sufficiency of the evidence supporting his conviction, we must uphold the jury's verdict if, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). In addition, we must "make all reasonable inferences in support of the jury's verdict." *United States v. Hewes*, 729 F.2d 1302, 1320 (11th Cir. 1985), *cert. denied sub nom., Caldwell v. United States*, 469 U.S. 1110, 105 S.Ct. 790, 83 L.Ed.2d 78 (1985).

a. *Sufficient evidence of overcharge*

The defendants challenge the sufficiency of the government's proof with respect to several aspects of the mail fraud convictions.[18] First, they contend there was insufficient evidence that the EPA and Dekalb County actually were overcharged because of the collusive bids. Defendants argue that there was no evidence that the bid price or profits were unreasonably high and thus no evidence of a scheme to defraud the EPA and Dekalb County of money. We conclude that there was sufficient evidence of a scheme to defraud the victims of money.[19]

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[18] The defendants do not challenge the sufficiency of the evidence which establishes the existence of the fraudulent scheme and our independent review of the record confirms that there was ample evidence that the defendants rigged the bids on the electrical contracting portion of the Snapfinger Creek project.

[19] The defendants also argue that the trial court erred in excluding economic evidence of instability in the economy and in various raw materials markets at the time the bids were submitted. The defendants offered this evidence as relevant to explain the seemingly high prices and profits on the Snapfinger subcontract. Defendants argued that because of the volatile economic environment, the bids had to be higher to account for potential price rises and that the profits turned out to be relatively high because the anticipated price fluctuations for raw materials did not occur to the extent provided for in the bid prices.

Judge Evans excluded the evidence because there was no evidence that any of the people who actually prepared the bid relied on the purported volatility in assimilating the bid price. After a review of the record, we conclude that Judge Evans was well within the broad discretionary bounds given to trial judges on evidentiary matters.

In *United States v. Goodman*, 850 F.2d 1473 (11th Cir. 1988), decided after oral arguments were heard in this case, the Eleventh Circuit held that where the government introduced evidence of anticompetitively high prices to prove the existence of a criminal antitrust conspiracy, the district court's exclusion of defendant's evidence that the prices were reasonable was reversible error. *Goodman* is distinguishable from this case for three reasons.

First, Judge Evans made it clear throughout the trial that she would not allow the government to prove the existence of an anti-

In her memorandum opinion, Judge Evans cited the following as evidence of overcharge. First, Trepte testified that he agreed to raise Fischbach and Moore's bid

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trust conspiracy with evidence that the Snapfinger bid prices and profits were unreasonably high. Judge Evans conducted the trial on the correct assumption that because collusive bidding is a per se antitrust violation, proof of unreasonably high prices or profits was not necessary to convict deefndants of conspiracy to violate the antitrust laws. Thus, in contrast to *Goodman*, Judge Evans did not allow the government to prove the requisite agreement to restrain trade through evidence of unreasonably high prices or profits. Rather, she limited the government to presenting direct evidence of the agreement (e.g., the evidence of the meeting between the defendants the evening before the bids were submitted and the resultant phone call to Trepte the following morning). *Cf. Goodman*, 850 F.2d at 1478 ("Although pricing is not an actual element of customer allocation, . . . once the government used that evidence in attempting to prove the existence of the customer allocation agreement, the door was open for the appellants to rebut the same.").

Second, even if Judge Evans had allowed the government to argue the existence of the conspiracy from evidence that the profits and prices were unreasonably high, it was not error to exclude the defendants' proffered economic evidence because this evidence did not explain why the Snapfinger prices and profits were seemingly high. For example, in *Goodman*, the defendants wanted to introduce evidence that their business costs increased to explain why they charged their customers more; they also wanted to introduce evidence of their competitors' profit and loss statements to show that the competitors' prices, although lower than the defendant's prices, were not commercially reasonable because they were below cost. In the first instance, evidence of *actual* higher operating costs would be a legitimate explanation of why the defendant raised the price they charged their customers. In the second instance, evidence that the competitors' prices were unreasonably low would tend to show that the defendant's prices, although higher, were not commercially unreasonable.

In this case, however, the defendants did not seek to explain their prices and profits by offering evidence that the actual raw material prices used to carry out the Snapfinger contract actually increased and that these prices were passed onto thier customers. Instead, they attempted to use expert evidence of the alleged volatility in the raw material markets to support an argument that their

$500,000 in exchange for Paxson Electric's promise to forgive an $89,000 debt Fischbach allegedly owed to Paxson Electric. Trepte also testified that Paxson Electric never collected the $89,000 debt. R10-240-41. Second, there was testimony that Dynalectric received 50% of Paxson Electric's Snapfinger profits (approximately $880,000) in exchange for doing virtually no work on the Snapfinger project other than "periodic site inspections." Third, Edward Baylin, the manager of Dynalectric's Atlanta office who prepared the materials cost estimate for Dynalectric's bid testified that he could not figure out how Dynalectric's actual bid of $5.3 million was derived when the highest price he could could come up with, using realistic (or somewhat higher) prices, was $4.7 million. R.11-444-452. There also was testimony that the profit level (approx. 40% of the contract price) was unusually high relative to comparable projects. We conclude that a rational jury could conclude from this evidence, viewing all inferences favorably to the government, that the collusive bidding resulted in overcharges on the Snapfinger contract.

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bid prices reflected anticipated jumps in the cost of necessary materials and that the profits were relatively high because the materials prices in fact were not as volatile as expected when the bids were prepared. As explained above, the proffered evidence is irrelevant absent evidence that defendants actually relied on this information in preparing their bids. Because the defendants failed to prove that they relied on alleged volatility in making their bids, the proffered evidence was properly excluded, even if the government had been allowed to argue that the high prices and profits evidenced a conspiracy.

Third, the type of evidence defendants sought to introduce in this case was very different from the evidence excluded in *Goodman*. In *Goodman*, the trial court erroneously excluded the profit and loss statements of a competitor of the defendants. This evidence was directly related to the specific events and actors under scrutiny in the trial. In this case, however, the evidence was not connected to any of the actual events in the case.

b. *Sufficient evidence that overcharge passed on to EPA and Dekalb County*

The defendants contend that even if there was sufficient evidence to establish that they overcharged Hyman, the general contractor, there is insufficient evidence to show that Hyman passed along these overcharges to the alleged victims of the scheme, the EPA and Dekalb County. Defendants rely primarily on the fact that Hyman had a negotiated lump sum contract, rather than a cost-plus contract, with the EPA and Dekalb County. However, the government presented testimony from a Hyman employee who worked on the Snapfinger bid indicating that Hyman's bid price was a direct function of the various subcontract prices obtained from allegedly competitive bids from the subcontractors. We believe that a rational jury could infer from this testimony that at least some of the overcharge was passed on to the EPA and Dekalb County.[20]

3. Jury Charge: No requirement that scheme to defraud actually succeed

The district court charged the jury that to convict the defendants of mail fraud, the jury did not have to find

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[20] The defendants' reliance on *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), is misplaced. The defendants assert that *Illinois Brick* precludes use of the pass-on theory where cost-plus contracts are not involved. The issue addressed by the Supreme Court in *Illinois Brick* was whether indirect purchasers of a product which the direct purchaser bought pursuant to rigged bids could collect actual and treble damages from the collusive bidders in a civil antitrust case. The court declined to allow the indirect purchasers to collect the damages, citing the difficulties inherent in proving the precise amount of overcharge passed on from the direct purchasers to the indirect purchasers. However, the Court did not hold nor imply that the absence of a cost-plus contract precludes an inference that some portion of the overcharge was passed along. Moreover, because our case does not require a calculation of actual damages, *Illinois Brick* is not controlling.

that the scheme to defraud actually succeeded.[21] We hold that the substance of this charge was correct: conviction under the federal mail fraud statute only requires the government to prove a scheme to defraud; the success or failure of the scheme is irrelevant. Our conclusion is supported by the language of the statute and by the cases interpreting it. The mail fraud statute itself addresses the use of the mails to further a scheme to defraud a victim of money or property. *McNally*, —— U.S. at ——, 107 S.Ct. at 2881. The statutory language does not set forth a requirement that the scheme to defraud actually must succeed in defrauding its victim of money or property.

In addition, both pre- and post-*McNally* cases confirm our conclusion that Judge Evans correctly instructed the jury that the success of the scheme was irrelevant. *See, e.g., United States v. Keane*, 852 F.2d 199 (7th Cir. 1988) ("[I]t may well be that none of this cost the City or anyone else one red cent. . . . But the mail fraud statute proscribes fraudulent schemes; it does not confine penalties to those whose schemes succeed in raking off cash, a point no less valid today than when emphasized on direct appeal [thirteen years ago]."); *Ward v. United States*, 845 F.2d 1459, 1462 (7th Cir. 1988) ("[T]he mail fraud statute punishes the scheme to defraud, and does not require that the intended victim actually have been defrauded. . . ."); *United States v. Baldinger*, 838 F.2d 176, 180 (6th Cir. 1988) (mail fraud statute reaches schemes whose *goal* is " 'the transfer of something of economic value to the defendant.' Comment, *The Intangible Rights Doctrine and Political—Corruption Prosecutions Under the Mail Fraud Statute*, 47

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[21] Judge Evans instructed the jury that "[i]t is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature or purpose of the scheme or that the material mailed was itself false or fraudulent, *or that the alleged scheme actually succeeded in defrauding anyone*. . . ." R 24-3327.

U.Chi.L. Rev. 562, 566 (1980)"); *United States v. Asher*, 854 F.2d 1483 (3d Cir. 1988) (mail fraud convictions affirmed where scheme *would have* defrauded victim of money *had it succeeded*); *United States v. Ochs*, 842 F.2d 515, 523 (1st Cir. 1988) (noting that *post-McNally* cases in which convictions were affirmed were those in which "the jury was in fact explicitly required to find that the fraudulent scheme was also *intended* to cause monetary harm." (emphasis added); *United States v. Dial*, 757 F.2d 163, 179 (7th Cir.) (mail fraud statute "punishes the scheme to defraud rather than the completed fraud itself."), *cert. denied*, 474 U.S. 838, 106 S.Ct. 116, 88 L.Ed.2d 95 (1985).

Convictions in pre-*McNally* mail fraud cases involving bid rigging withstood sufficiency of evidence challenges absent an explicit showing that the victim actually lost money. For example, in *United States v. Washita Construction Co.*, 789 F.2d 809, 818 (10th Cir. 1986),

> [t]he evidence adduced at trial indicated that the conspirators arranged to win highway contracts without submitting competitive bids. The scheme devised by the conspirators circumvented the state and federal competitive bidding procedures and allowed the contractors to virtually predetermine who would be awarded a contract. By arranging for complimentary bids to be submitted, the conspirators deceitfully created the illusion of competitive bidding and concealed their illegal collusion.

Significantly, the court did not indicate that any evidence of actual overcharge was adduced at trial, yet sustained the mail fraud convictions in the face of a sufficiency of evidence challenge. *See also United States v. Young Bros., Inc.*, 728 F.2d 682, 689 (5th Cir.) (to withstand sufficiency challenge to mail fraud convictions, "the government was required to show that the mailings (relating to the billing and payment of the $10,001) were

'in furtherance' of the bidrigging scheme."), *cert. denied*, 469 U.S. 881, 105 S.Ct. 246, 83 L.Ed.2d 184 (1984).[22]

4. Other Challenges—Mail Fraud

The defendants' remaining challenges to their mail fraud convictions warrant little discussion. They contend that there was an insufficient causal connection between the use of the mails and their participation in the bidding scheme. They point out that the two mailings which are the basis for the mail fraud counts occurred in 1984 and 1985, after Dynalectric received its final payment pursuant to the joint venture agreement in 1983 and well after the rigged bids were submitted in 1979. However, as we concluded in our discussion of the statute of limitations issue, the payments from Hyman to Paxson Electric were important aspects of the conspiracy. Thus, the pay-

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[22] We note that there are several post-*McNally* cases whose language might be interpreted to require proof of actual loss (i.e., proof that the scheme to defraud actually succeeded) to support a mail fraud conviction. *See, e.g., United States v. Evans*, 844 F.2d 36, 39 (2d Cir. 1988) ("If a scheme to defraud must involve the deceptive obtaining of property, the conclusion seems logical that the deceived party must lose some money or property."); *United States v. Runnels*, 833 F.2d 1183, 1185 (6th Cir. 1987) ("Decisions permitting convictions despite the absence of economic loss still required that the defendant deprive the victim of some economic benefit."). This circuit's decision in *United States v. Conover*, 845 F.2d 266 (11th Cir. 1988) has ambiguous language which similarly might be interpreted as requiring that the scheme to defraud must succeed. *See Conover*, 845 F.2d at 271 ("On the basis of *McNally*, it is inferable that to sustain the convictions in this case, the Government would have to offer proof and the jury would have to be instructed that [the victim] would have paid less. . . .").

However, neither *Conover* nor any of the other cases cited above address the distinction between a successful and an unsuccessful scheme to defraud the victim of money or property. These cases do not address the issue of whether a mail fraud conviction can stand where there is sufficient evidence that the defendants schemed and intended to defraud the victims of money or property, but failed to cause the victims any actual loss. Thus none of these cases are apposite.

ments which were mailed in 1984 and 1985 clearly were integral to the scheme to defraud. *See United States v. Young Bros., Inc.*, 728 F.2d at 689 (court sustained mail fraud conviction in bid rigging context where defendant claimed that the mailings were not sufficiently closely related to the scheme to defraud; the court reasoned that mailing a payoff to a coconspirator after the rigged bids were submitted was sufficient because "it reasonably can be inferred that [the defendant] would not have agreed to the scheme on behalf of his company without being paid."); *United States v. Rodgers*, 624 F.2d at 1310 (mail fraud conviction upheld where victim mailed to defendants the final payment of a contract obtained by rigged bids; the court concluded that "[t]he scheme would have been meaningless, incomplete, and futile without final award and payment which were accomplished through the mail. Clearly, the mails were used 'in furtherance' of the scheme.").

Dynalectric's claim that there was insufficient evidence that it "caused" the mails to be used is without merit. Paxson Electric, through its affiliate CCC Electric, caused the mails to be used by requisitioning the two payments from Hyman. Evidence was presented at trial that in the ordinary course of business, the general contractor (Hyman) mails the subcontractor its contract payments following the receipt and approval of the subcontractor's payment requisition. Thus, we conclude that Paxson Electric reasonably could have anticipated that the mails would be used in the ordinary course of business to facilitate the transfer of contract payments to it (via CCC Electric) from Hyman pursuant to CCC Electric's requisition for payment. *United States v. Rodgers*, 624 F.2d at 1310 n. 17. Moreover, because Dynalectric was a knowing participant in the scheme to defraud, the actions of coconspirator Paxson Electric which caused the mails to be used in furtherance of the scheme are sufficient to make Dynalectric legally liable for the use

of the mails. *United States v. Hewes*, 729 F.2d at 1322 n. 24. As we explained in *Hewes*, "[t]he mere fact that [defendant's] role in the scheme may have ended prior to the time the [mailings] occurred does not shield him from criminal liability." *Id.* at 1324.

C. *Kastigar Claim: Wesley Paxson*

Wesley Paxson claims that the government improperly used grand jury testimony he gave in 1984 under a grant of use immunity to obtain the indictment and conviction in this case, in violation of *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972).[23] This court recently explained in *United States v. Caporale*, 806 F.2d 1487, (11th Cir. 1986), *cert. denied*, —— U.S. ——, 107 S.Ct. 3265, 97 L.Ed.2d 763 (1987), that under *Kastigar* "the government bears the burden of proving that testimony that a defendant gave under a promise of use immunity was not directly or indirectly used in a subsequent prosecution against the defendant. To meet that burden, the government must show by a preponderance of the evidence that its evidence in the subsequent prosecution was derived from a legitimate independent source." (Citing *Kastigar*, 406 U.S. at 460, 92 S.Ct. at 1665). However, the government does not have to "negate all abstract 'possibility' of taint." *United States v. Byrd*, 765 F.2d 1524, 1529 (11th Cir. 1985). A *Kastigar* claim involves factual determinations, therefore we must affirm the district court's *Kastigar* decision unless it is clearly erroneous. *Caporale*, 806 F.2d at 1518; *United States v. Hampton*, 775 F.2d 1479, 1484 (11th Cir. 1985).

Paxson's *Kastigar* claim reaches this court with a substantial track record. In the proceedings below, the *Kastigar* issue was raised and briefed on three separate oc-

[23] Paxson was granted immunity pursuant to 18 U.S.C. § 6002.

casions.[24] Prior to trial, both the magistrate and the district court issued written opinions denying Paxson's *Kastigar* motions. These decisions were issued after the magistrate and the district court judge examined *in camera*[25] transcripts of witnesses who appeared before the indicting grand jury, a transcript of Paxson's immunized testimony, and fifty exhibits submitted by the government as evidence of legitimate independent sources. In addition, the government submitted the sixty-five page affidavit of Hayes Gorey, the lead government attorney for both the grand jury proceedings and Paxson's trial. Gorey was present during Paxson's immunized grand jury appearance.[26] Gorey's affidavit meticulously linked the independent sources of evidence (i.e., the 50 exhibits) to each piece of evidence presented to the indicting grand jury and to be adduced against Paxson

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[24] *See* Record on Appeal, vol. 2-26 (Paxson's Motion to Dismiss); 2-40 (Government's Opposition to Motion to Dismiss); 3-55 (Paxson's Reply to Government's Opposition to Motion to Dismiss); 3-59-22-33 (Magistrate's Report and Recommendation); 3-61 (Paxson's Objections to Magistrate's Report and Recommendation); 3-64-5-9 (Government's Opposition to Paxson's Objections to Magistrate's Report and Recommendation); 3-74-7-10 (District Court Order Denying Motion to Dismiss on *Kastigar* Grounds); 6-152 (Paxson's Renewed Motion to Dismiss); 6-158 (Government's Answer to Motion to Dismiss); 7-164 (Paxson's Reply to Government's Opposition); 7-174-28-33 (District Court Memorandum Opinion Denying Motion to Dismiss).

[25] The pre-trial *in camera* examination of grand jury materials was proper. *See Byrd*, 765 F.2d at 1532-34.

[26] In *Byrd* we issued a strong warning that it is "unwise" to permit an attorney who is familiar with the immunized testimony to participate in the prosecution. Nevertheless, in *Caporale*, we rejected a *Kastigar* claim on facts very similar to the instant case. Although the prosecutor in *Caporale* had read the immunized testimony, the government, as in this case, met its burden of showing an independent source for each piece of evidence. Also like this case, the prior immunized testimony was self-serving and of no real value in the subsequent investigation.

at trial which conceivably was directly or indirectly revealed in Paxson's immunized testimony. Gorey also submitted a post-trial supplemental affidavit. At the conclusion of the trial, these exhibits and the affidavits were unsealed and Paxson was allowed to examine them. After reviewing this evidence, Paxson renewed his motion to dismiss the indictment on *Kastigar* grounds and in the same post-trial motion asked in the alternative for a judgment of acquittal or an evidentiary hearing on his *Kastigar* claim. The district court denied this motion in its memorandum opinion.

Paxson raises no new *Kastigar* issues on appeal, nor has he "come forward with any persuasive proof that the district court's determination as to any questioned source was clearly erroneous." *Caporale*, 806 F.2d at 1518. We have carefully reviewed the record and agree with the decisions of the district court and magistrate that the government has clearly demonstrated that it made no direct or indirect use of Paxson's immunized testimony. The government convincingly demonstrated an independent source for all portions of the evidence adduced before the indicting grand jury and at trial against Paxson which conceivably had any relation to his immunized testimony. The government's evidence showed that Paxson's immunized testimony was not used as a direct evidentiary source or as a source of investigatory leads.[27]

We note that much of Paxson's immunized "testimony was self-serving and of no real value in the subsequent

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[27] To establish legitimate independent sources, the government had to show that all evidence presented to the grand jury and at trial either was in the possession of the government prior to Paxson's immunized grand jury appearance or was derived from a source independent of Paxson's testimony (i.e., that Paxson's testimony provided neither new direct evidence nor investigatory leads). *United States v. Byrd*, 765 F.2d 1524, 1531 (11th Cir. 1985).

investigation." *Id.* at 1518-19.[28] Paxson claims that *United States v. Hampton*, 775 F.2d 1479 (11th Cir. 1985), holds that the self-exonerating nature of immunized testimony is irrelevant to a *Kastigar* claim. Contrary to what Paxson urges, *Hampton* held that a defendant's non-inculpatory testimony is relevant to a *Kastigar* claim *if* it yielded direct evidence or investigatory leads. In *Hampton*, it was undisputed that the defendant's immunized testimony contained information about "several important matters and details" useful in the investigation for which no independent sources were established. *Id.* at 1486-87. In addition, in *Hampton* the government made no effort to systematically establish independent sources for all evidence it introduced to the grand jury.

By contrast, in this case the government made a thorough and organized presentation that all of its evidence which conceivably could have been attributable to Paxson's immunized testimony was derived from independent sources. More importantly, unlike *Hampton*, Paxson's self-serving testimony provided no direct evidence or investigatory leads for which the government did not have a legitimate independent source. In fact, Paxson's testimony apparently drew the Snapfinger investigation to a halt for thirteen months until Trepte's grand jury testimony revealed substantial inconsistencies with Paxson's immunized testimony about the Snapfinger project.

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[28] In *Caporale*, the court noted that "the chief government prosecutor went so far as to state that he believed that [the defendant's] earlier testimony was untruthful." 806 F.2d at 1519 n.34. Evidence of the self-serving nature of Paxson's immunized testimony is even stronger in this case. Paxson was convicted of perjury and obstruction of justice for his immunized grand jury testimony by the District Court for the District of Columbia. The conviction currently is on appeal to the D.C. Circuit.

Paxson also claims that he was entitled to a full-blown post-trial evidentiary hearing on his *Kastigar* motion.[29] The decision to grant an evidentiary hearing lies within the sound discretion of the trial court and we review the district court's denial of the hearing only for an abuse of discretion. *See United States v. Slocum*, 708 F.2d 587, 600 (11th Cir. 1983) (on appeal, district court's decision not to hold an evidentiary hearing on *Brady* and newly discovered evidence allegations subject to abuse of discretion standard of review); *United States v. Johnson*, 596 F.2d 147, 148 (5th Cir. 1979) (decision whether to hold evidentiary hearing on motion for new trial "is within the trial court's sound discretion, subject to our review only for abuse"); *United States v. Dicesare*, 765 F.2d 890, 895 (9th Cir. 1985); *United States v. Cardarella*, 588 F.2d 1204, 1205 (8th Cir. 1978). We are cognizant of the fact that *Kastigar* motions generally are resolved following an adversary evidentiary hearing. *Byrd*, 765 F.2d at 1532. As this court stated in *Byrd*, the purpose of a *Kastigar* motion is to "ensur[e] that the government's evidence has been obtained from legitimate, independent sources. . . ." *Id.* at 1533. However, is is clear that an evidentiary hearing is not mandated for all *Kastigar* motions and that whether a hearing is necessary to properly resolve a *Kastigar* claim depends on the particular facts of the case. *See, e.g., Byrd; United States v. Provenzano*, 620 F.2d 985, 1006 (3d Cir.) ("If the Government's documents conclusively demonstrate prior knowledge, we know of no reason why a hearing must be held."), *cert. denied*, 449 U.S. 899, 101 S.Ct. 267, 66 L.Ed.2d 129 (1980); *United States v. Lipkis*, 770 F.2d 1447, 1451-52 (9th Cir. 1985) (no evidentiary hearing necessary when defendant stipulated that there were only minimal differences between immunized

[29] In a post-trial motion, Paxson requested alternative remedies of dismissing the indictment on a judgment of acquittal because of a *Kastigar* violation or, at a minimum, an evidentiary hearing on his *Kastigar* motion. R. 6-152-22.

testimony and non-immunized testimony given several months prior to the immunized testimony).

We conclude that under the facts of this case, the district court did not abuse its discretion in declining to grant Paxson's post-trial motion for an evidentiary hearing. From their pre-trial examinations of the government's *Kastigar* evidence, both the district court and the magistrate concluded that the government had exceeded its *Kastigar* burden by presenting ample and conclusive evidence of independent sources for all evidentiary and investigatory leads which Paxson's testimony could have generated. After trial, the district court turned over all the government's *in camera* evidence to Paxson. Despite his access to the government's evidence, the only alleged *Kastigar* violations which Paxson could point out to the district court either were meritless or reiterated *Kastigar* claims raised pre-trial, which the district court already had rejected. Because of Paxson's inability to demonstrate the need for a post-trial *Kastigar* hearing after he gained access to the *in camera* evidence, coupled with the district court's indepth familiarity with the government's *Kastigar* evidence, the court's first-hand knowledge of the evidence actually presented at trial, and the self-serving nature of Paxson's immunized testimony, we conclude that the district court's refusal to grant an evidentiary hearing was not an abuse of discretion.

In summary, we conclude that the district court was not clearly erroneous in dismissing Paxson's *Kastigar* claim.

D. *Other Issues*

1. 404(b) Evidence

The defendants claim that the district court abused its discretion by admitting 404(b) evidence of other alleged bidrigging attempts despite the defendants' offer to stipulate to the issue of intent. Federal Rule of Evi-

dence 404(b) allows evidence of a defendant's prior bad acts to be admitted if the evidence is relevant to an issue other than the defendant's character (e.g., defendant's criminal intent) and if the probative value of the evidence is not substantially outweighed by its prejudicial value. *United States v. Bennett*, 848 F.2d 1134, 1137 (11th Cir. 1988). Judge Evans' decision to admit the evidence cannot be overturned on appeal unless she abused the wide range of discretion afforded to district court judges on evidentiary matters. *Id.*

The disputed evidence pertained to three separate alleged bidrigging attempts by Dynalectric and Paxson Electric employees. The government contended, *inter alia*, that the evidence was relevant to the defendants' intent to rig the Snapfinger bids. The defendants do not contest that the evidence was relevant to show intent,[30] but contend that the district court improperly rejected their offer to stipulate to intent. Immediately prior to the testimony of the first 404(b) witness, the defendants offered the following written stipulation, which the government refused to accept and which the district court rejected: "If the jury finds that the defendants met and agreed to fix bids as alleged, intent to restrain trade shall be presumed."

We conclude that the offer to stipulate was inadequate because it was a tautology. It is meaningless to offer to stipulate that if the defendants met *and* agreed to rig bids, they intended to restrain trade. Clearly, if they agreed to rig the bids, there is a strong inference that they intended to restrain trade. Thus, the proffered

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[30] *See United States v. Bi-Co Pavers, Inc.*, 741 F.2d 730, 737 (5th Cir. 1984) (In a criminal antitrust prosecution of bidrigging, 404(b) evidence of defendant's other attempts to rig bids is admissible because it is "clearly relevant to show that [defendant] acted with the intent to rig bids (rather than to enter into a joint venture)....").

stipulation was inadequate and the district court did not abuse its discretion by rejecting it.[31]

2. Anonymous Phone Call

Dynalectric claims that the district court erred by allowing Trepte, an employee of Fischbach & Moore who was intricately involved in the Snapfinger bidding process, to testify about a phone call he received from an unidentified caller on the morning the bids were submitted. Trepte testified that the caller told him what price he should use to bid on the Snapfinger job and that "there had been an arrangement that was satisfactory to the parties." The district court admitted the statement pursuant to Fed. R. Evid. 801(d)(2)(E) and we can reverse the court's decision on this issue only if it was clearly erroneous. *United States v. Alexander*, 850 F.2d 1500, 1505 (11th Cir. 1988).

Statements by a coconspirator of a party made during the course of and in furtherance of a conspiracy are admissible, nonhearsay evidence under Fed. R. Evid. 801(d)(2)(E). Dynalectric claims that because the caller was unidentified, the statements could not be characterized as statements of a coconspirator; thus, Trepte's testimony about the call was inadmissible hearsay outside the scope of Rule 801.

To be admissible under Rule 801(d)(2)(E), the party offering the testimony must prove by a preponderance of the evidence "that there was a conspiracy involving the declarant and the nonoffering party, and that the statement was made 'in the course of and in furtherance of

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[31] Because we conclude that the defendants' offer to stipulate was inadequate, we do not reach the issue of whether an adequate offer to stipulate to intent that is not agreed to by the government is sufficient to prevent 404(b) evidence relevant to intent from being admitted. *See United States v. Williford*, 764 F.2d 1493, 1498 (11th Cir. 1985).

The defendants' other 404(b) arguments are without merit and warrant no discussion.

the conspiracy.'" *Bourjaily v. United States*, —— U.S. ——, 107 S.Ct. 2775, 2778, 97 L.Ed.2d 144 (1987). In making its evidentiary assessment, the district court may look both to the alleged hearsay statement itself and to independent outside evidence. *Id.* 107 S.Ct. at 2781-82; *United States v. Chestang*, 849 F.2d 528, 531 (11th Cir. 1988), *Alexander*, 850 F.2d at 1505.

Based on the record before us, we conclude that the district court did not err in admitting the testimony about the phone call as a statement of a coconspirator made in furtherance of the conspiracy. There was independent evidence of a conspiracy and of Trepte's participation in it. Trepte testified that he met with Paxson the night before he received the phone call and they agreed that he would go along with the proposed bidrig if Paxson and Ewalt could reach some sort of agreement later that evening. When Trepte left the meeting with Paxson that evening, he testified that he was told he "would get a phone call to let [him] know whether they had come to terms." R. 9-188. There also is evidence that Trepte's employer, Fischbach & Moore, did in fact participate in the bidrigging scheme by raising its Snapfinger bid by $500,000. This is sufficient to establish the conspiracy without reference to the phone call. In other words, the fact that Trepte agreed to rig the bids if Ewalt also so agreed and the fact that Trepte later actually rigged Fischbach & Moore's bid after he received the phone call establishes a conspiracy. The substance of the telephone call simply bolsters this conclusion.

With respect to the relative anonymity of the caller, although Trepte did not know precisely who it was that called him, it is clear from the testimony and the context that the caller was associated either with Dynalectric or Paxson Electric. Similarly, it is clear from the context and Trepte's testimony that the call was made in furtherance of the conspiracy. We therefore conclude that the evidence of the phone call was properly admitted.

3. Juror's Introduction of Extrinsic Evidence

During an overnight recess in the jury's deliberations, one of the jurors reviewed notes she had taken during a health law class, jotted down three phrases from these notes on a bookmark, and took the bookmark and read these phrases to her fellow jurors the following morning. The phrases, which the juror informed her fellow jurors were "principles of the jury process," were:

> (1) Innocent until proven guilty; (2) All evidence and testimony is presumed truthful until proven otherwise; and (3) In dealing with conflicting evidence merely decide which has the greatest probability of being true or simply, what is the most reasonable and sensible.

Shortly thereafter, pursuant to a request made just before court had recessed the preceding day, the jury was reinstructed on the proper consideration of circumstantial evidence. Later that day the jury returned its verdicts.

Upon learning that the juror had brought her notes into the jury room, the district judge held an evidentiary hearing during which she questioned each juror about the incident. Based on the jurors' responses and the substance of the alleged extrinsic evidence, Judge Evans concluded that the juror's conduct had not created a reasonable possibility of prejudice.

Although defendants correctly state that a jury's verdict cannot stand if there is a reasonable possibility that the verdict was prejudiced by the introduction of improper extrinsic evidence, *see United States v. Perkins*, 748 F.2d 1519, 1533 (11th Cir. 1984), we agree with the district court that the juror's notes on her bookmark did not create a reasonable probability of prejudice. We assume, *arguendo*, that the notes the juror brought into the jury room during deliberations constituted improper extrinsic evidence and that all members of the jury

heard and remembered her comments. We conclude, however, that the substance of the notes was not dramatically different from what the judge actually charged the jury. Thus, we conclude that the district court correctly held that the jury's decision was not tainted by improper extrinsic evidence.

III. CONCLUSION

In summary, we conclude that the district court correctly held that the indictment, filed on September 19, 1986, was brought within the five-year statute of limitations for criminal antitrust actions. We also affirm the mail fraud convictions. The jury instructions and the indictment were such that the jury could not have convicted the defendant solely on a theory of the *McNally*-type intangible rights. There also was sufficient evidence to support the mail fraud convictions. Also, the jury was properly instructed that the scheme to defraud did not have to succeed in order to convict defendants of mail fraud. We also conclude that the district court did not err in admitting the 404(b) evidence or the testimony about the anonymous phone call, nor was the jury tainted by extrinsic evidence. Finally, no improper use was made of Wesley Paxson's immunized grand jury testimony.[32]

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

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[32] All other issues raised by defendants on appeal are without merit and warrant no discussion.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-8451

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DYNALECTRIC COMPANY, PAXSON ELECTRIC COMPANY, G. W. WALTHER EWALT, WESLEY C. PAXSON, SR.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion November 21, 1988, 11th Cir. 198—, —— F.2d ——)

(Filed Jan. 4, 1989)

Before RONEY, Chief Judge, and ANDERSON, Circuit Judges, and ALLGOOD*, Senior District Judge.

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* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ R. L. Anderson
United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

Docket No. CR86-350A

UNITED STATES OF AMERICA

vs.

DYNALECTRIC COMPANY

JUDGEMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date: June 2, 1987

WITH COUNSEL: Rodney O. Thorson

PLEA: Not Guilty

There being a verdict of: Guilty

Defendant has been convicted as charged of the offense(s) of conspiring to restrain interstate trade and commerce, in violation of Title 15, United States Code, Section 1, as charged in count one of the indictment, and devising a scheme and artifice to defraud the United States of America, through its agency, the Environmental Protection Agency, in violation of Title 18, United States Code, Section 1341, as charged in counts two and three of the indictment.

SENTENCE OR PROBATION ORDER: The defendant shall pay a fine in the amount of $1,250,000 as to

count one, $1,000 as to count two, and $250,000 as to count three and shall be allowed THIRTY (30) DAYS to pay the fine.

SIGNED BY: U.S. District Judge
/s/Orinda D. Evans
Orinda D. Evans Date: June 10, 1987

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

Docket No. CR86-350A

UNITED STATES OF AMERICA

vs.

G.W. WALTHER EWALT

JUDGEMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date: June 2, 1987.

WITH COUNSEL: James H. Kelly

PLEA: Not Guilty

There being a verdict of: Guilty

Defendant has been convicted as charged of the offense(s) of conspiring to restrain interstate trade and commerce, in violation of Title 15, United States Code, Section 1, as charged in count one of the indictment, and devising a scheme and artifice to defraud the United States of America, through its agency, the Environmental Protection Agency, in violation of Title 18, United States Code, Section 1341, as charged in counts two and three of the indictment.

SENTENCE OR PROBATION ORDER: TWO (2) YEARS on count one, to serve SIX (6) MONTHS, balance of sentence suspended and the defendant is placed

on probation for the balance on the condition that he pay a fine in the amount of $10,000.00 and that he perform community service as prescribed by the U.S. Probation Officer and approved by the Court. IT IS FURTHER ORDERED that defendant pay a fine in the amount of $1,000.00 as to count two and $15,000.00 as to count three. IT IS FURTHER ORDERED that defendant shall be allowed THIRTY (30) DAYS to pay the fines in counts one, two and three. IT IS FURTHER ORDERED that the defendant be allowed to voluntarily surrender to the Institution as directed by the U.S. Marshal.

COMMITMENT RECOMMENDATION: The Court orders commitment to the custody of the Attorney General and recommends the Attorney General designate Federal Prison Camp at Allenwood, Pennsylvania, as the place of the imprisonment portion of this sentence.

SIGNED BY: U.S. District Judge
/s/ Orinda D. Evans
Orinda D. Evans Date: June 10, 1987

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

Criminal No. CR86-350A

UNITED STATES OF AMERICA

v.

DYNALECTRIC COMPANY; FISCHBACH AND MOORE, INCORPORATED; PAXSON ELECTRIC COMPANY; G. W. WALTHER EWALT; and WESLEY C. PAXSON, SR.,
Defendants.

INDICTMENT

[Filed Sept. 19, 1986]

COUNT ONE

(15 U.S.C. § 1)

The Grand Jury charges:

I.

DEFENDANTS

1. Dynalectric Company ("Dynalectric") is indicted and made a defendant herein. Dynalectric is a corporation organized and existing under the laws of the State of Florida, and is headquartered in McLean, Virginia. It is a wholly owned subsidiary of Dynalectron Corporation ("Dynalectron"), which is also headquartered in McLean, Virginia. During the period of time covered by this indictment, Dynalectric engaged in electrical con-

struction throughout the United States, including the Northern District of Georgia where it maintained an office in Atlanta. Dynalectron's revenues from its electrical construction contracting operations (conducted through Dynalectric and a Canadian subsidiary) for its fiscal year ended December 31, 1980, were approximately $228 million.

2. Fischbach and Moore, Incorporated ("Fischbach and Moore") is indicted and made a defendant herein. Fischbach and Moore is a corporation organized and existing under the laws of the State of New York, and is headquartered in Dallas, Texas. It is a wholly owned subsidiary of Fischbach Corporation, which is headquartered in New York, New York. During the period of time covered by this indictment, Fischbach and Moore engaged in electrical construction throughout the United States, including the Northern District of Georgia where it maintained an office in Atlanta. Fischbach and Moore's sales in its fiscal year ended September 30, 1980, were approximately $447 million.

3. Paxson Electric Company ("Paxson Electric") is indicted and made a defendant herein. Paxson Electric is a corporation organized and existing under the laws of the State of Florida, and is headquartered in Jacksonville, Florida. During the period of time covered by this indictment, Paxson Electric engaged in electrical construction in various parts of the United States, including the Northern District of Georgia. Paxson Electric's sales in its fiscal year ended September 30, 1980, were approximately $21 million.

4. Each of the individuals named in this paragraph is indicted and made a defendant herein. Each of these defendants, during all or part of the period of time covered by this indictment has been associated with the designated defendant corporation in the capacity indicated.

Individual Defendant	Corporation	Position
G. W. Walther Ewalt	Dynalectric	President
Wesley C. Paxson, Sr.	Paxson Electric	President

5. Wherever in this indictment reference is made to any act, deed or transaction of a corporation, such allegation shall be deemed to mean that such corporation engaged in such act, deed or transaction by or through its officers, directors, agents, employees or representatives while they were actively engaged in the management, direction, control or transaction of its business or affairs.

II.

CO-CONSPIRATORS

6. Various firms and individuals, not made defendants in this indictment, participated as co-conspirators in the offense charged herein and performed acts and made statements in furtherance thereof.

III.

TRADE AND COMMERCE

7. In or about May 1979, DeKalb County, Georgia ("the County"), announced that it would accept sealed competitive bids from general contractors for a contract to build a new waste water treatment plant to be known as the Snapfinger Creek Waste Water Treatment Plant ("Snapfinger Creek project"). A general contractor is a contractor who agrees to be responsible for all of the construction required to be performed on a project.

8. Electrical construction was an integral part of the Snapfinger Creek project. Because general contractors often are not able to perform or manage electrical construction, they solicit bids (sometimes also called quotations or "quotes") from contractors who specialize in electrical construction. Such bids or quotes from electrical construction contractors represent offers to per-

form specified electrical construction on a project and to supply materials at a stated price. General contractors base the cost of electrical construction to be included in their bids to project owners upon a bid from an electrical contractor, usually the lowest bid price received.

9. Several general contractors ordered the plans and specifications for the Snapfinger Creek project. Their bids were required to be submitted to the County by 1:30 p.m. on September 7, 1979. One of the general contractors that prepared and submitted a bid to the County for the Snapfinger Creek project was The George Hyman Construction Company ("Hyman"), headquartered in Bethesda, Maryland.

10. In preparing its bid for the Snapfinger Creek project, Hyman sought independent, competitive bids from electrical contractors. By seeking independent, competitive bids from electrical contractors, Hyman hoped to obtain the lowest possible price for the electrical construction required to be performed as part of the Snapfinger Creek project.

11. On September 7, 1979, prior to the time the general contractors' bids were due, Dynalectric, Fischbach and Moore and Paxson Electric submitted bids for the electrical construction portion of the Snapfinger Creek project to Hyman and to other general contractors. Hyman received the following bids:

Company	Price
Paxson Electric	$4,915,000
Dynalectric	$5,420,000
Fischbach and Moore	$6,335,000

12. After receiving the electrical contractors' bids for the electrical construction portion of the Snapfinger Creek project, Hyman used Paxson Electric's quote to compute its bid price and submitted to the County its bid to perform the entire contract. Hyman's bid of

$45,339,000 was the lowest bid received by the County. In November 1979, the County awarded the Snapfinger Creek project to Hyman. Hyman, thereafter, awarded a subcontract for the electrical construction portion of the Snapfinger Creek project to a firm affiliated with Paxson Electric, C.C.C. Electric, Inc. ("CCC"), which Paxson Electric designated to receive the award. CCC and Paxson Electric agreed to divide evenly the profits earned on the Snapfinger Creek project.

13. As the electrical construction subcontractor, CCC was required, among other things, to install all electrical systems for the plant and was responsible for securing labor, materials, tools, equipment and services needed to complete its portion of the Snapfinger Creek project.

14. During the period of time covered by this indictment, essential equipment, materials, machinery and tools needed for installation or use by CCC on the Snapfinger Creek project were shipped into the State of Georgia from points of origin outside the State of Georgia in a continuous and uninterrupted flow of interstate commerce.

15. The United States of America, through its agency, the Environmental Protection Agency ("EPA"), funded approximately seventy-five percent of the Snapfinger Creek project's total construction costs. From 1981 through 1985, the EPA paid approximately $33.6 million to the County for construction on the Snapfinger Creek project. These funds were transmitted in interstate commerce to the County. From 1980 through 1985, Hyman received payments from the County totalling approximately $48.7 million for construction on the Snapfinger Creek project. Hyman, in turn, made payments totalling approximately $6.3 million to CCC for electrical construction on the Snapfinger Creek project.

16. The activities of the defendants and co-consiprators, as charged herein, were within the flow of, and substantially affected, interstate commerce.

IV.

OFFENSE CHARGED

17. Beginning in or about August 1979 and continuing thereafter until at least January 1985, the exact dates being unknown to the Grand Jury, the defendants and others, known and unknown, engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Title 15, United States Code, Section 1.

18. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were that:

(a) defendant Paxson Electric would submit the lowest bid to Hyman and other general contractors for the electrical construction portion of the Snapfinger Creek project;

(b) the defendant companies would submit collusive, artifically high and rigged bids to Hyman and other general contractors for the electrical construction portion of the Snapfinger Creek project;

(c) in return for defendant Fischbach and Moore's participation in the conspiracy, defendant Paxson Electric would forgive a pre-existing debt of $89,330.06; and

(d) in return for defendant Dynalectric's participation in the conspiracy, defendant Paxson Electric would form a silent joint venture with defendant Dynalectric pursuant to which defendant Dynalectric would receive 50 percent of the profits earned from the performance of the electrical construction portion of the Snapfinger Creek project.

19. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which, as hereinbefore charged, they combined and conspired to do, including among other things:

(a) meeting at the downtown Hilton Hotel in Atlanta, Georgia, on September 6, 1979, to discuss their bids on the electrical construction portion of the Snapfinger Creek project;

(b) agreeing that defendant Paxson Electric would be the low bidder on the electrical construction portion of the Snapfinger Creek project;

(c) submitting collusive, artificially high and rigged bids to Hyman and other general contractors for the electrical construction portion of the Snapfinger Creek project;

(d) agreeing that in return for defendant Fischbach and Moore's participation in the conspiracy, defendant Paxson Electric would forgive a preexisting debt of $89,330.06;

(e) agreeing that in return for defendant Dynalectric's participation in the conspiracy, defendant Paxson Electric would form a silent joint venture with defendant Dynalectric pursuant to which defendant Dynalectric would receive 50 percent of the profits earned from the performance of the electrical construction portion of the Snapfinger Creek project;

(f) paying defendant Dynalectric the sum of $880,000 as its share of the profits on the electrical construction portion of the Snapfinger Creek project; and

(g) having defendant Paxson Electric's designee, CCC, perform the electrical construction portion of the Snapfinger Creek project and receive payments from Hyman for said performance.

V.

EFFECTS

20. The aforesaid combination and conspiracy charged herein had the following effects, among others:

(a) the price of the electrical construction portion of the Snapfinger Creek project was fixed and established at an artificially high and noncompetitive level;

(b) competition for the electrical construction portion of the Snapfinger Creek project was restrained and suppressed;

(c) Hyman and other general contractors were denied the right to receive competitive and noncollusive bids for the electrical construction portion of the Snapfinger Creek project; and

(d) the County and the United States of America, through its agency, the EPA, were denied the benefits of receiving bids from Hyman and other general contractors on the Snapfinger Creek project that were not inflated by collusive, artificially high and rigged bids submitted by the defendant companies.

VI.

JURISDICTION AND VENUE

21. The aforesaid combination and conspiracy was carried out, in part, within the Northern District of Georgia within five years of this indictment.

COUNTS TWO AND THREE

(18 U.S.C. § 1341)

The Grand Jury further charges:

22. Each and every allegation contained in paragraphs 1 through 5 and 7 through 13 of Count One of this in-

dictment is here realleged with the same force and effect as though said paragraphs were set forth in full detail.

23. Beginning in or about August 1979 and continuing thereafter until at least January 1985, the exact dates being unknown to the Grand Jury, the defendants and co-conspirators devised and intended to devise a scheme and artifice to defraud the County and the United States of America, through its agency, the EPA, of:

(a) money; and

(b) their right to free and open competition for the bidding on the electrical construction portion of the Snapfinger Creek project, such bidding to be conducted honestly, fairly and free from craft, trickery, deceit, corruption, dishonesty and fraud.

24. It was part of the aforesaid scheme and artifice to defraud that the defendants, and others, known and unknown to the Grand Jury, would and did submit collusive, artificially high and rigged bids in order to induce the general contractor selected to build the Snapfinger Creek project to award the subcontract for the electrical construction portion of the project to defendant Paxson Electric.

25. On or about the dates of mailing set forth below, for the purpose of executing and carrying out the scheme and artifice to defraud, and attempting to do so, the defendants and others did knowingly cause the two checks listed below to be delivered by mail by the United States Postal Service according to the directions thereon, to an address within the Northern District of Georgia, each such use of the mails constituting a separate count of this indictment and a separate violation of Title 18, United States Code, Section 1341:

COUNT TWO

Instrument:

Check No. 01322 from Hyman to CCC, dated May 24, 1984, in the amount of $144,620.94

Addressed from:

The George Hyman Construction Co.
3440 Hollywood Boulevard, Suite 300
Hollywood, Florida 33021

Addressed to:

C.C.C. Electric, Inc.
207 15th Street, N.W.
Atlanta, Georgia 30318

Mailed on or about: May 24, 1984

COUNT THREE

Instrument:

Check No. 02097 from Hyman to CCC, dated January 24, 1985, in the amount of $62,492.32

Addresed from:

The George Hyman Construction Co.
3440 Hollywood Boulevard, Suite 300
Hollywood, Florida 33021

Addressed to:

C.C.C. Electric, Inc.
207 15th Street, N.W.
Atlanta, Georgia 30318

Mailed on or about: January 24, 1985

A TRUE BILL

Dated:

_____

Foreman

/s/ Douglas H. Ginsburg
DOUGLAS H. GINSBURG
Assistant Attorney General

/s/ Joseph H. Widmar
JOSEPH H. WIDMAR

/s/ Anthony V. Nanni
ANTHONY V. NANNI

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Supreme Court, U.S.
FILED
MAR 15 1989
JOSEPH F. SPANIOL, JR.

Nos. 88-1325 and 88-1328

In the Supreme Court of the United States

OCTOBER TERM, 1988

PAXSON ELECTRIC COMPANY AND
WESLEY C. PAXSON, SR., PETITIONERS

v.

UNITED STATES OF AMERICA

DYNALECTRIC COMPANY AND
G.W. WALTHER EWALT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a bid-rigging, profit-splitting conspiracy continues for purposes of the criminal statute of limitations until the conspirators receive their anticipated profits and payoffs on the rigged contract (Nos. 88-1325 and 88-1328).

2. Whether petitioners were properly convicted of mail fraud where the indictment charged that they deprived their victims of "money" and the jury was instructed that it must find that the victims were deprived of "money" in order to convict (No. 88-1325).

3. Whether it was an abuse of discretion for the district court to deny an evidentiary hearing on a claim that immunized testimony was improperly used by the government, where the district court found that the government made a detailed, thorough, and complete showing that it had not made any improper use of such testimony, and the objecting witness failed to demonstrate that an evidentiary hearing would adduce any information to rebut that showing (No. 88-1325).

4. Whether the district court abused its discretion in refusing to give certain proposed jury instructions (No. 88-1328).

5. Whether the district court abused its discretion in refusing to admit certain evidence that it found to be irrelevant (No. 88-1328).

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1325

PAXSON ELECTRIC COMPANY AND
WESLEY C. PAXSON, SR., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 88-1328

DYNALECTRIC COMPANY AND
G.W. WALTHER EWALT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (88-1325 Pet. App. 1a-42a)[1] is reported at 859 F.2d 1559. The opinions of the district court (Pet. App. 44a-80a) are not reported.

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[1] Unless otherwise indicated, "Pet. App." refers to the appendix to the petition in No. 88-1325.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1988. Petitions for rehearing were denied on January 4, 1989. The petition for a writ of certiorari in No. 88-1325 was filed on February 8, 1989. The petition for a writ of certiorari in No. 88-1328 was filed on February 9, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners were convicted on one count of conspiracy to restrain interstate trade, in violation of the Sherman Act, 15 U.S.C. 1, and on two counts of mail fraud, in violation of 18 U.S.C. 1341. Petitioner Wesley Paxson was sentenced to six months in prison, to be followed by 18 months' probation, and was fined a total of $126,000. Petitioner Paxson Electric Co. was fined a total of $951,000. Petitioner Dynalectric Company was fined a total of $1,501,000. Petitioner Ewalt was sentenced to six months in prison, to be followed by 18 months' probation, and was fined a total of $26,000. The court of appeals affirmed. Pet. App. 1a-42a.

1. Petitioner Paxson Electric Company (Paxson Electric), petitioner Dynalectric Company (Dynalectric), and a third electrical contractor, Fischbach and Moore, Inc. (Fischbach), all planned to submit bids in late 1979 on a $5 million electrical subcontract for a federally funded waste water treatment project in DeKalb County, Georgia, known as Snapfinger Creek. Petitioner Wesley C. Paxson, Sr., was the president of Paxson Electric. Petitioner Ewalt was the president of Dynalectric.

The evidence at trial showed that petitioners and Fischbach rigged their bids on the Snapfinger Creek project. Fischbach's Atlanta branch manager, Bernard Trepte,

testified that he met with Wesley Paxson and Walther Ewalt before the bids were to be submitted and agreed to rig the bids. The purpose of their agreement was to ensure that Paxson Electric would be the low bidder and would be selected for the job. In exchange, Paxson Electric agreed to forgive a pre-existing $89,000 debt that Fischbach owed it from an earlier project and agreed to give Dynalectric one-half of the profits that Paxson Electric would receive on the Snapfinger project. Paxson Electric was selected for the job and subsequently divided its $1.7 million profit with Dynalectric. Pet. App. 3a-4a.

Trepte's account of the bid-rigging agreement was corroborated by Paxson Electric and Dynalectric employees and by business records. The evidence showed that Dynalectric's bid was considerably higher than Dynalectric's branch manager had estimated that it would be. In addition, the evidence showed that petitioner Wesley Paxson directed his accountant to transfer the $89,000 Fischbach debt to the Snapfinger project and that no attempt was ever made to collect that debt. The evidence also established that Paxson Electric paid Dynalectric $880,000, approximately one-half of the profits on the Snapfinger project, even though Paxson Electric's affiliate, CCC Electric, had performed all the work and Dynalectric had not contributed any capital, equipment, or services to the project. See Pet. App. 4a, 27a-28a; 17 R. 1603-1604; 20 R. 2259, 2389-2391.[2]

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[2] Petitioners unsuccessfully argued at trial that the $880,000 payment was made pursuant to a silent joint venture between Dynalectric and Paxson Electric that was lawfully formed after the bids were submitted because Paxson feared that Ewalt would take the job away from him. 16 R. 1365; 20 R. 2387; 21 R. 2537. The evidence showed, however, that Paxson knew that his company had been designated as the electrical subcontractor by the general contractor at the time the bids were submitted; it also showed that the designation could not be

2. The court of appeals affirmed the convictions on all counts. Pet. App. 1a-42a. The court first rejected petitioners' contention that the prosecution was barred by the five-year criminal statute of limitations, 18 U.S.C. 3282. Contrary to petitioners' argument, the court of appeals concluded that the statute of limitations did not begin to run on the date on which the rigged contract was awarded.[3] Pet. App. 4a-17a. Adopting the position taken by every other court of appeals that has considered the issue, the court held "that a criminal conspiracy to restrain trade by collusive, anti-competitive bidding continues for the purposes of the five-year statute of limitations until either the final payments are received under the illegal contract or the final distribution of illicit profits among the conspirators occurs." *Id.* at 8a-9a.[4] In this case, Dynalectric received its final payoff from Paxson Electric in 1983, and Paxson Electric continued to receive payments pursuant to the rigged contract until 1985 (*id.* at 4a); both events occurred well within the five-year period preceding the filing of the indictment.

The court of appeals also held that petitioners' mail fraud convictions were consistent with this Court's de-

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changed without Paxson Electric's consent. 13 R. 782; 19 R. 2078; 20 R. 2380; 22 R. 2724. The evidence further showed that the supposedly lawful silent joint venture was carefully kept secret both from the contracting authorities and from employees of Paxson Electric and Dynalectric. 9 R. 86-87; 13 R. 783; 16 R. 1310; 17 R. 1594-1595, 1640; 19 R. 2049; 20 R. 2387-2388; 21 R. 2402, 2436.

[3] The contract was awarded on January 14, 1980. The indictment was filed on September 16, 1986.

[4] The court rejected petitioners' reliance on the civil antitrust statute of limitations, 15 U.S.C. 15b, noting that it was not the appropriate statute of limitations in a criminal case. Pet. App. 13a. The court also found that "a central objective of a conspiracy to restrain trade is to garner illicit profits" and thus rejected petitioners' contention that a restraint of trade ends when the rigged bids are submitted. *Id.* at 14a.

cision in *McNally* v. *United States*, 107 S. Ct. 2875 (1987). Pet. App. 17a-25a. The court pointed out that the indictment and the jury instructions in this case make it clear that the essence of the bid-rigging scheme was to defraud the scheme's victims of money. Unlike in *McNally*, the court concluded that the jury in this case must have based its verdict on a finding that petitioners had schemed to deprive their victims of money or property and could not have based its verdict on any deprivation of "intangible rights." Pet. App. 25a.

The court of appeals also rejected Paxson's contention that the government improperly used his immunized 1984 grand jury testimony to obtain the indictment and conviction in this case, in violation of *Kastigar* v. *United States*, 406 U.S. 441 (1972). Pet. App. 33a-37a. The court concluded that the government had "convincingly demonstrated an independent source for all portions of the evidence adduced before the indicting grand jury and at trial against Paxson which conceivably had any relation to his immunized testimony." *Id.* at 35a. The court similarly rejected Paxson's contention that he was entitled to an evidentiary hearing on the *Kastigar* issue. The court noted that the government had made a detailed showing that it had not used the immunized testimony. In addition, Paxson had access to all of the government's evidence supporting that showing. And in spite of having a full opportunity to do so, Paxson had failed to suggest any basis for challenging the government's showing. In those circumstances, the court of appeals concluded, the district court had not abused its discretion in denying a hearing. Pet. App. 36a-37a.

Finally, the court rejected petitioners' contention that the district court had abused its discretion in excluding certain evidence at trial. Pet. App. 26a-28a n.19. Petitioners sought to introduce evidence of instability in the economy

and various raw material markets. That evidence, they suggested, was relevant because it helped explain the seemingly high prices and profits on the Snapfinger project. The court of appeals affirmed the district court's ruling that the proffered evidence was irrelevant because "there was no evidence that any of the people who actually prepared the bids relied on the purported volatility" of market prices in preparing their bids. *Ibid.* The court also noted that the government had been barred from using evidence of unreasonably high prices and profits to establish the antitrust conspiracy. *Ibid.*[5]

ARGUMENT

1. Petitioners contend (88-1325 Pet. 11-14; 88-1328 Pet. 13-21) that the statute of limitations barred their prosecution because the indictment was returned more than five years after they submitted their rigged bids and the contract was awarded. The court of appeals correctly rejected that contention. It concluded that the bid-rigging conspiracy continued until the conspirators received and divided their anticipated profits on the illegal contract. Pet. App. 9a-10a. That ruling is in accord with the decisions of every other court of appeals that has addressed the question. *United States* v. *Evans & Assocs. Constr. Co.*, 839 F.2d 656, 661 (10th Cir. 1988); *United States* v. *Northern Improvement Co.*, 814 F.2d 540 (8th Cir.), cert.

[5] The court of appeals rejected numerous other challenges as well, several without discussion. Among the latter was the Dynalectric petitioners' contention that the district court erred in failing to instruct the jury on their defense that they acted pursuant to a lawful silent joint venture. 88-1328 Pet. 21-24. See Pet. App. 72a (district court ruling that petitioners' proposed instructions were "superfluous and confusing" and that the jury had properly been instructed that it must find that the charged bid-rigging agreement was made before the bids were submitted).

denied, 108 S. Ct. 141 (1987); *United States* v. *A-A-A Electrical Co.*, 788 F.2d 242, 244-246 (4th Cir. 1986); *United States* v. *Inryco, Inc.*, 642 F.2d 290, 293-295 (9th Cir. 1981), cert. dismissed, 454 U.S. 1167 (1982).[6]

The principles governing the scope of a Sherman Act conspiracy were first enunciated by this Court in *United States* v. *Kissel*, 218 U.S. 601 (1910). In that case, the Court explained that a conspiracy is a partnership for criminal purposes that continues until its success or abandonment. *Id.* at 608, 610; accord *Hyde* v. *United States*, 225 U.S. 347, 369 (1912) (a conspiracy continues "until full fruition be secured"). Where there is no abandonment of

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[6] The Dynalectric petitioners rely on dicta in the *Inryco* case to suggest that the Ninth Circuit adheres to the narrower view that only overt acts that themselves restrain trade have the effect of continuing a Sherman Act conspiracy. 88-1328 Pet. 15-16. Although the *Inryco* court pointed out that there were such overt acts in the case before it, neither in *Inryco* nor in any other decision has the Ninth Circuit held that such acts are necessary for the conspiracy to continue. Moreover, in *United States* v. *Walker*, 653 F.2d 1343 (9th Cir. 1981), cert. denied, 455 U.S. 908 (1982), the Ninth Circuit held, under the general conspiracy statute, 18 U.S.C. 371, that if a conspiracy contemplates the division of the profits of an illegal scheme, the conspiracy continues for purposes of the criminal statute of limitations, regardless of whether the act of dividing the profits is itself illegal. *Id.* at 1350. The court in *Walker* also noted that that "seems to be one of the theories applied in *United States* v. *Inryco*." *Ibid.* Petitioners' suggestion (88-1328 Pet. 16 n.22) that a Sherman Act conspiracy is different from other conspiracies for statute of limitations purposes is baseless. The same statute of limitations applies, and the courts of appeals before and after *Inryco* and *Walker* have correctly found no reason to adopt that distinction. See *Hyde* v. *United States*, 225 U.S. 347, 369 (1912) (applying the statute of limitations rationale of *United States* v. *Kissel*, 218 U.S. 601 (1910), a Sherman Act conspiracy case, to the general conspiracy statute). In short, petitioners' suggestion that the decision in the present case conflicts with the view of the Ninth Circuit is incorrect.

the goals of the conspiracy, it is the scope of the conspiratorial agreement that determines when the statute of limitations begins to run. *Grunewald* v. *United States,* 353 U.S. 391, 397 (1957).[7]

In this case, the indictment charged and the evidence showed that the agreement to rig bids included an agreement to divide the profits on the project.[8] The indictment

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[7] *Grunewald* does not hold that only conspiratorial objectives that are "criminal" serve to toll the statute of limitations. In *Grunewald,* the Court held only that proof that the conspirators concealed their illegal activities after the conspiracy had accomplished its objectives did not, by itself, establish that the concealment was part of the conspiracy. 353 U.S. at 402. *Grunewald* does not suggest that a conspiracy cannot be continued by acts that are legal and that it necessarily terminates on the last date on which the conspirators commit an act that is itself illegal.

[8] Petitioners suggest (88-1325 Pet. 12, 13; 88-1328 Pet. 15) that the statute of limitations began to run no later than the day that the bidding was completed, because after that date trade was no longer being "restrained" within the meaning of the Sherman Act. That suggestion is doubly wrong. First, as long as the conspiratorial agreement encompassed the receipt of profits on the rigged contract, acceptance of those profits continued the illegal conspiracy. Where a criminal conspiracy contemplates the receipt of illicit profits, the conspiracy continues until those profits are received, whether or not the charging statute makes the receipt of those profits illegal. *United States* v. *Girard,* 744 F.2d 1170, 1172 (5th Cir. 1984); *United States* v. *Helmich,* 704 F.3d 547, 549 (11th Cir.), cert. denied, 464 U.S. 939 (1983); *United States* v. *Mennuti,* 679 F.2d 1032, 1035 (2d Cir. 1982); *Atkins* v. *United States,* 307 F.2d 937, 940 (9th Cir. 1962); *Koury* v. *United States,* 217 F.2d 387, 388 (6th Cir. 1954).

Second, trade was "restrained" every time DeKalb County and the federal agency involved in the project, the Environmental Protection Agency, made payments on the artificially set contract price. Petitioners might have abandoned their illegal enterprise at any time by giving notice of the fraud, making possible rescission of the illegal contract. Had they done so—thereby abandoning the conspiracy—the statute of limitations would have started to run at that time. *United*

was filed on September 19, 1986. Paxson Electric continued to receive its payments on the Snapfinger Creek project until at least January 1985, and it gave one-half of its anticipated profits to Dynalectric no earlier than 1983. The court of appeals was therefore correct in holding that the five-year statute of limitations did not bar this prosecution.[9]

2. Petitioners Paxson and Paxson Electric contend (88-1325 Pet. 14-18) that their mail fraud convictions are inconsistent with the decision in *McNally* v. *United States*, 107 S. Ct. 2875 (1987), which held that the mail fraud statute is not violated by a scheme to defraud citizens of their intangible right to honest government services. The court of appeals correctly rejected that contention.

States v. *Kissel*, 218 U.S. at 610. Instead, petitioners continued to accept payments on the contract until 1985 and thereby continued their participation in the conspiracy. See *Hyde* v. *United States*, 225 U.S. at 369 ("Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law.").

[9] Because petitioners' offense continued until at least January 1985, when the last check was mailed to CCC Electric on the project (see Pet. App. 8a), Dynalectric's claim (88-1328 Pet. 17-18) that its sentence is unconstitutionally retroactive is also incorrect. Prior to its repeal, the "Alternative Fines" provision of the Criminal Fine Enforcement Act of 1984, 18 U.S.C. 3623(c)(1) (Supp. IV 1986), under which Dynalectric's enhanced fines were imposed, applied to "offenses committed after December 31, 1984." Pub. L. No. 98-596, §§ 6(a), 10, 98 Stat. 3137, 3138 (1984). Because the conspiracy continued past the effective date of Section 3623, the crime was within the coverage of that provision. See *United States* v. *Hartness*, 845 F.2d 158, 163 (8th Cir. 1988), cert. denied, 109 S. Ct. 308 (1988); *United States* v. *Giry*, 818 F.2d 120, 134-135 (1st Cir. 1987), cert. denied, 108 S. Ct. 162 (1987); *United States* v. *Gibbs*, 813 F.2d 596, 601-602 (3d Cir. 1987), cert. denied, 108 S. Ct. 83 (1987); *United States* v. *Baresh*, 790 F.2d 392, 404 (5th Cir. 1986).

The indictment in this case charged that the defendants committed mail fraud by defrauding DeKalb County and the United States Environmental Protection Agency of both "money" and "their right to free and open competition for the bidding on the electrical construction portion of the Snapfinger Creek project * * *." 88-1328 Pet. App. 63a. In charging the jury on the mail fraud counts, moreover, the district court defined a scheme to defraud to include "any plan or course of action intended to deceive others and to obtain by false or fraudulent pretenses money or property from the persons so deceived." 24 R. 3326. As the court of appeals observed (Pet. App. 24a), the charge did not include any instruction on an "intangible rights" theory of mail fraud. The record thus reflects that, in this case, unlike *McNally,* the indictment charged that the victims were defrauded of "money," and the trial court charged the jury that a scheme to defraud includes an intent to "obtain * * * money or property" by false pretenses. The convictions did not rest on an "intangible rights" theory of mail fraud, as did the convictions in *McNally.*

Petitioners Paxson and Paxson Electric argue for reversal (88-1325 Pet. 16-18) on the ground that the jury was not expressly instructed that it must find that the victims of the scheme actually suffered a deprivation of money or property. As the court of appeals ruled (Pet. App. 29a-31a), however, the mail fraud statute does not require that the fraudulent scheme actually succeed. Moreover, as we have explained, the instructions were adequate to ensure that the jury actually found a scheme to defraud DeKalb County and the federal government of money or property. Furthermore, to show a fraudulent deprivation of money it is sufficient to demonstrate that the victims parted with money under false pretenses. Cf. *McNally,* 107 S. Ct. at 2882 (condemning absence of jury instruction

that "petitioners obtained property by means of false representations").[10] In this case, DeKalb County awarded the contract on the false representation that the bids were competitive.[11]

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[10] In fact, the court of appeals found that there was sufficient evidence that the victims of the fraud were actually "overcharged," in that Paxson Electric received more money than it would have received under a competitively bid contract. Pet. App. 26a-28a. Petitioners' claim that there was no overcharge is based largely on the district court's explanations that the jury could not infer bid rigging from the size of the bids or the profits received. See 88-1325 Pet. 17. In addition to the direct evidence of overcharge, however, once the jury found from co-conspirator testimony and documentary proof that the bids in fact were rigged, the inference was clear that the prices resulting from the rigged bids were higher than prices that would have resulted from competitive bidding.

[11] Contrary to petitioners' contention (88-1325 Pet. 15), the court of appeals' holding does not conflict with the Tenth Circuit's decision in *United States* v. *Shelton*, 848 F.2d 1485 (1988). There, as in *McNally*, the defendant was a public official, and the mail fraud count was based on the allegation that, through the receipt of illegal kickbacks from road and bridge building suppliers, the defendant had deprived the citizens of Muskogee County of their right to honest government. 848 F.2d at 1495. The Tenth Circuit concluded that when the jury instructions were "read together," they permitted the jury improperly to convict the defendant, not on the ground that he had deprived his victims (the citizens) of money (because the kickbacks came from suppliers), but merely on the ground that he had deprived the citizens of their intangible right to honest government. *Id.* at 1496. In contrast, both the indictment and the jury charge in this case make plain that the verdict was based on the finding that petitioners schemed to defraud the victims—DeKalb County and the federal government—of money.

More generally, as the court of appeals noted (Pet. App. 19a-20a), the task of determining whether a particular jury in a particular case might have improperly relied on a theory precluded by *McNally* has not proved "impossible" (88-1325 Pet. 16) for the courts of appeals. Of course, the problem is of ever-diminishing importance, as it arises

3. Petitioners Paxson and Paxson Electric renew their argument (88-1325 Pet. 6-11) that the district court should have held an adversarial hearing on the claim that immunized testimony was improperly used at trial in violation of *Kastigar* v. *United States,* 406 U.S. 441 (1972). The court of appeals correctly rejected that argument.[12]

On September 28, 1984, Paxson testified pursuant to a grant of immunity before a grand jury that had been investigating bid rigging in the electrical construction industry for more than two years. Paxson was asked about bid rigging generally and about the Snapfinger Creek project in particular. He denied any knowledge of or involvement in rigging any jobs, including Snapfinger Creek. As the court of appeals noted (Pet. App. 36a), Paxson's testimony "drew the Snapfinger investigation to a halt for thirteen months" until Bernard Trepte was called before the grand jury and "revealed substantial inconsistencies with Paxson's immunized testimony about the Snapfinger project." Trepte's testimony, together with information that the grand jury had gathered in the two years before Paxson testified, led to the present prosecution.

In response to *Kastigar* motions, the government took steps to meet its burden of showing that its evidence against Paxson was independently derived. The government supplied the court with a 65-page affidavit and 50

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only out of pre-*McNally* trials. For the future, Congress has overturned *McNally* by amending the federal fraud statutes to cover schemes to deprive others of the intangible right to honest services. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508.

[12] This argument is, of course, open only to petitioner Wesley Paxson and not to petitioner Paxson Electric, because Wesley Paxson's immunized testimony could have been freely used against the company without violating any right of the company's. See generally *Braswell* v. *United States,* 108 S. Ct. 2284 (1988).

exhibits that "meticulously linked the independent sources of evidence * * * to each piece of evidence presented to the indicting grand jury and to be adduced against Paxson at trial." Pet. App. 34a. The magistrate, the district court, and the court of appeals, all of whom reviewed those submissions, concluded that the government had met and exceeded its heavy burden of showing that Paxson's self-serving, exculpatory grand jury testimony had not been used directly or indirectly in his criminal prosecution. *Id.* at 37a, 35a.[13]

Given the strength of the government's showing on the *Kastigar* issue in this case, the courts below correctly concluded that no useful purpose would have been served by

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[13] Relying on *United States* v. *McDaniel,* 482 F.2d 305 (8th Cir. 1973), the Paxson petitioners assert that the government's burden under *Kastigar* is particularly heavy when a government attorney familiar with immunized testimony participates in the prosecution of the case. 88-1325 Pet. 8. As petitioners recognize (88-1325 Pet. 8 n.5), however, the Eleventh Circuit is not in disagreement with the Eighth Circuit on this point. See Pet. App. 34a n.26; *United States* v. *Hampton,* 775 F.2d 1479, 1485-1486 (11th Cir. 1985).

The Eleventh Circuit simply concluded that the government had met its heavy burden in this case. Pet. App. 35a-36a. The facts here are quite different from those in *McDaniel.* There, the defendant had given three volumes of highly inculpatory evidence to a state grand jury, and the federal prosecutors, not knowing that the testimony had been given under a grant of immunity, prosecuted the defendant after reviewing the incriminating testimony. 482 F.2d at 307-308. Stressing the unusual circumstances of that case (*id.* at 312), the court held that, because the United States Attorney "could have perceived no reason to segregate McDaniel's [incriminatory] testimony from his other sources of information * * * the government is confronted with an insurmountable task in discharging the heavy burden of proof imposed by *Kastigar.*" *Id.* at 311. In this case, by contrast, Paxson's grand jury testimony was exculpatory, and all of the government attorneys who reviewed it knew that it was immunized and could not be used in any subsequent criminal prosecution.

granting Paxson the evidentiary hearing that he had requested. By the end of the trial, Paxson had reviewed all of the government's submissions detailing the independent sources for its trial evidence and had heard all of the evidence adduced at trial. Nonetheless, he could not point to anything in the record to support his contention that the government had violated *Kastigar.*[14] In these circumstances, the court of appeals properly held that the denial of a "full-blown post-trial evidentiary hearing" was not an abuse of discretion. Pet. App. 36a-37a; see *United States* v. *Provenzano,* 620 F.2d 985, 1006 (3d Cir.), cert. denied, 449 U.S. 899 (1980); *United States* v. *Lipkis,* 770 F.2d 1447, 1451 (9th Cir. 1985).[15]

4. The Dynalectric petitioners contend (88-1328 Pet. 21-24) that the district court improperly failed to instruct the jury on "the role of the Paxson-Dynalectric joint ven-

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[14] The Paxson petitioners state that an adversarial evidentiary hearing would have enabled them to "probe what uses may have been made of [Paxson's] testimony" (88-1325 Pet. 9), and they speculate that an unspecified, non-evidentiary use might have been made of the immunized testimony by unspecified government employees (*id.* at 8-9). A hearing that amounts to a fishing expedition is not warranted based only on such speculation. Through its pretrial and post-trial affidavits, the government demonstrated that it had independent sources for all of the evidence it adduced at trial, whether on direct or cross-examination, and petitioners offered nothing that cast doubt on that showing.

[15] The Paxson petitioners state that "long-established practice has been to grant adversarial hearings on *Kastigar* motions." 88-1325 Pet. 10. The only decision cited, however, *United States* v. *Nemes,* 555 F.2d 51 (2d Cir. 1977), does not support that contention. *Nemes* ruled, in this respect, only that where the government had satisfied the trial court "that the evidence presented to the federal grand jury and to the trial jury was derived from [independent] sources * * *," the government's burden under *Kastigar* was satisfied. *Id.* at 55 (footnote omitted).

ture" (*id.* at 22) or on the "lawfulness of the joint venture" (*id.* at 24). The instructions petitioners proposed, however, were misleading.

In particular, the Dynalectric petitioners' proposed "joint venture" instructions would have misled the jury into believing that, if an arrangement could be called a "joint venture," the bid-rigging agreement would be lawful. For example, the Dynalectric petitioners' proposed Instruction No. 18 would have required acquittal if Ewalt's bid-rigging agreement was "accompanied by or part of a legitimate joint venture or partnership with Paxson." 4 R. Doc. 92 at 28. Even if there was a "legitimate" joint venture between Paxson Electric and Dynalectric, however, that agreement was not a license for the two of them to rig bids with Fischbach, which was never alleged to be part of any "joint venture." Similarly, proposed Instruction No. 15 stated that "[i]t is also not illegal for contractors to bid for a job or to perform work as a legitimate joint venture. In a joint venture, two or more contractors join together and submit a single bid on a project." *Id.* at 22-23. In this case, however, Paxson Electric and Dynalectric did not submit "a single bid"; they submitted two separate bids, which led the letting authorities to believe the bids were independently derived. Thus, the requested instruction had no basis in the record.

In any event, the district court properly charged the jury on the elements of the Sherman Act offense. In order to convict, the jury was required to find (24 R. 3319, 3322-3323) "that a conspiracy to rig bids as alleged was knowingly formed and was existing at or before submission of the bids on September 7, 1979"; "that the conspiracy continued at least until September 20, 1981[;] and that one or more members of the conspiracy committed acts in furtherance of the conspiracy * * * on or after that date." Contrary to petitioners' claim (88-1328 Pet. 23),

therefore, the charge did not "amount[ ] effectively to a directed verdict against the defendants on the statute of limitations issue."[16] Nor did the instructions "force[ ] the jury to treat the joint venture itself as a *per se* Sherman Act offense." *Ibid.* The jury could not have returned a guilty verdict unless it found that the defendants agreed to rig bids.

5. Finally, the Dynalectric petitioners argue (88-1328 Pet. 24-27) that the court of appeals erred in affirming the district court's refusal to admit portions of petitioners' economic evidence. That argument is without merit. The evidence in question was irrelevant to the issues on which it was offered.

The district court gave petitioners the opportunity to show that their bids were legitimately prepared and were not "excessive" through evidence showing how their bids were prepared and showing the factors they took into account in bidding. The court refused, however, to prolong the trial with economic evidence of fluctuating copper prices and general market conditions, to be introduced from sources that had no familiarity with or personal knowledge of the Snapfinger bidding. Such evidence was properly excluded because no one who had prepared the bids claimed to have relied on copper prices and general market factors. 19 R. 2089-2098; 20 R. 2145-2151; 21 R. 2602-2613; 16 R. 1457-1460. Indeed, petitioner Ewalt admitted that there was no reference to fluctuating copper prices during the preparation of Dynalectric's bid. 16 R.

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[16] While the district court rejected petitioners' generalized "joint venture" instructions as "superfluous and confusing" (Pet. App. 72a), the instructions actually given clearly required that, to convict, the jury must find that the agreement to rig bids was made before the submission of the bids. It was immaterial whether the exact amount of consideration Dynalectric would receive was specified at that time. Compare 88-1328 Pet. 22 n.29.

1456. Hence, the evidence was not relevant to explaining why the bids were set as they were.[17]

Moreover, contrary to petitioners' suggestion (88-1328 Pet. 25), the government did not rely on the size of the bids or the profits as circumstantial proof of the existence of the conspiracy. The district court ruled in that context that it would not permit either petitioners or the government to argue the reasonableness or unreasonableness of prices and profits. 20 R. 2157. And the jury was expressly charged: "neither the amount of profits made by any of the defendants on the Snapfinger jobs nor the form in which those profits were ultimately paid or realized are relevant to the issue of whether the defendants agreed to fix or rig the bids. Rather, the proper focus is whether an agreement to rig the bids was made as alleged." 24 R. 3320. In these circumstances, there was no abuse of discretion in the district court's refusal to admit some of petitioners' economic evidence.

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[17] That other courts permit defendants to introduce "*relevant* economic data" to support a claim that there was no agreement (88-1328 Pet. 26 (emphasis added)) does not create a conflict with the decision in this case, where the court held the particular economic evidence to be irrelevant.

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

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OCTOBER TERM, 1988

DYNALECTRIC COMPANY AND G.W. WALTHER EWALT,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY MEMORANDUM OF DYNALECTRIC COMPANY AND G.W. WALTHER EWALT IN SUPPORT OF PETITION

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1. In its opposition to the Petition for Certiorari, the government attempts to downplay the importance of this case and the stark departure of the Eleventh Circuit's opinion from previous holdings of this Court.

To begin with, the government is wrong in contending that every court of appeals addressing the issue has ruled that mere contract performance and receipt of payment is the continuation of a Sherman Act bid-rigging conspiracy. Opp. at 6. Its attempt to dismiss as "dicta" the Ninth Circuit's holding in *United States v. Inryco, Inc.*, 642 F.2d 290 (9th Cir. 1981), *cert. dismissed*, 454 U.S. 1167 (1982) is particularly misplaced. The *Inryco*

court's finding that the conspiracy involved continued restraints on competition was the essential rationale for its decision—a rationale overlooked by the Fourth and Eighth Circuits in their later decisions purporting to rely upon that opinion. Far from being dicta, the *Inryco* holding embraced the essence of a Sherman Act violation: its continuation depended upon continued restriction on trade. Both the decision below and other circuit holdings purporting to follow *Inryco* ignore this essential criminal element of a Sherman Act violation, and are therefore inconsistent.

Nor does the Ninth Circuit's subsequent opinion in *United States v. Walker*, 653 F.2d 1343 (9th Cir. 1981), *cert. denied*, 455 U.S. 908 (1982), decided under the general conspiracy statute, 18 U.S.C. § 371, support the government's contentions. Opp. at 7 n.6. A conspiracy "to defraud" is inherently different from one "to restrain trade" and has a different essential criminal purpose. While the applicable statute of limitations may be the same, the nature of conduct made criminal by Congress is not, nor are the temporal dimensions of that criminal offense. The scope of the criminal behavior is not determined by the wording of the indictment—it is defined by the central criminal purpose of the conduct charged. Here, that purpose was to restrain trade.

The government's contentions also ignore an unbroken line of decisions where this Court has held that the prosecutor cannot extend the duration of a conspiracy—and thereby revive for prosecution stale claims—simply by alleging as conspirational "objectives" events that do not constitute essential elements of the offense charged. This is true not only in conspiracies, but also in other situations where this Court has focused on the conduct outlawed rather than the conduct alleged. *See, e.g.*, *Bridges v. United States*, 346 U.S. 209, 222-23 (1953) ("The embellishment of the indictment does not lengthen the time for prosecution. It is the statutory definition

of the offense that determines whether or not the statute of limitations comes within the Suspension Act."); *United States v. McElvain*, 272 U.S. 633 (1926) (alleged purpose to defraud did not enlarge the crime because it was not an essential element of the crime on which the indictment was based); *United States v. Noveck*, 271 U.S. 201 (1926) (same). The distinction between Section 371 offenses and other crimes was also made clear when this Court stated that an offense cannot be enlarged "by prosecutorial sleight of hand to overcome a time bar." *Dennis v. United States*, 384 U.S. 855, 863 (1966).

The fatal flaw of the government's logic lies in its misinterpretation of *Grunewald v. United States*, 353 U.S. 391 (1957). Contrary to the government's assertion, *Grunewald* allows conspiracies to continue only until the central *criminal* objective has been achieved or abandoned, not until all actions incident to that objective have come to pass. 353 U.S. at 405. Petitioners agree that lawful acts may be part of an illegal conspiracy. *See* Opp. at 8 n.7. But the government misses the essential distinction. The acts in furtherance of a conspiracy, whether they be legal or not, must be in pursuit of an illegal *objective*. Under the rationale of *Grunewald*, mere performance of a contract awarded as a result of an already completed restraint of trade cannot further that goal. If the law were otherwise, the government would merely have to allege (as it did here) that fruits were part of the alleged conspiratorial agreement and it would overcome, by *ipse dixit*, the holding in *United States v. Kissel*, 218 U.S. 601, 607 (1910) that "the mere continuance of the result of a crime does not continue the crime."

Perhaps in recognition of the infirmity of its argument, the government for the first time asserts that "trade was 'restrained' every time DeKalb County and . . . [the EPA] made payments on the artificially set contract

price." Opp. at 8 n.8. But this attempt to reconcile the instant case with *Grunewald* and *Inryco* is not supported by the record. Unlike *Inryco*, there is no allegation—or evidence—to even suggest that competition was restrained after the bidding. The court of appeals was correct in assuming that any restraint of trade ended when the contract was awarded (App. A at 11a), and in this *post hoc* justification effort the government is unable to offer any theory of how restraint on competition—the central criminal purpose of a Sherman Act conspiracy—might have occurred after the contract was let.[1]

To suggest, as the government does (Opp. at 9 n.8), that an act of confession is necessary to abandon a conspiracy is to argue for potentially indefinite tolling of the statute of limitations. *See* Pet. at 19. Contrary to the government's suggestion, withdrawal may be manifest in many ways, including "the [r]esumption of competitive behavior." *United States v. United States Gypsum Co.*, 438 U.S. 422, 464 (1978).

The government misreads *Hyde v. United States*, 225 U.S. 347 (1912), in suggesting that it stands for the proposition that petitioners could only abandon the conspiracy "by giving notice of the fraud." Opp. at 8 n.8. *Gypsum* teaches that *Hyde* cannot be so narrowly con-

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[1] The government's new argument that trade was "restrained" with the payments is not only unsupportable as a matter of law, but is inconsistent with the theory on which this case was tried. The jury was charged that "a conspiracy is an agreement between two or more persons to accomplish *an unlawful purpose*" (R24-3321), which, for bid rigging, was defined to be "an agreement between two or more persons *to limit or interfere with competition.*" R24-3319 (emphasis added). Nothing was said about profit or receipt of payments. In fact the jury was told that it did not matter whether the prices said "were reasonable or unreasonable, high or low." R24-3320. These instructions alone precluded any finding that trade was "restrained" every time DeKalb County made a payment on the contract.

strued. Instead, *Hyde* requires only that a co-conspirator must "withdraw his support from [the acts] or incur the guilt of their continuance." 225 U.S. at 369-70. This "withdrawal of support" to signal abandonment has perfect symmetry with the criterion of "continuous cooperation" for a conspiracy to continue. *United States v. Kissel*, 218 U.S. 601 (1910). Whatever cooperation or support Paxson got from Dynalectric and Ewalt, it certainly ended before the payments to CCC in 1985.

2. The government's position that receipt of payments continued the conspiracy is even more strained as applied to the *ex post facto* sentences imposed on Dynalectric and Ewalt. The government argues that "the offense continued until at least January 1985, when the last check was mailed to CCC Electric" (Opp. at 9 n.9) and that "*Petitioners* continued to accept payment on the contract until 1985." Opp. at 9 n.8 (emphasis added). Yet there was no allegation or evidence that Dynalectric or Ewalt shared in that check, and the unquestioned fact is that the joint venture ended in 1983. Moreover, the government ignores entirely the fact that the jury only found the alleged conspiracy to continue until September 20, 1981. R24-3323. Any argument of continuation beyond that date is pure conjecture unsupported by the jury's verdict.

3. In its attempt to explain the trial court's refusal to instruct the jury as to the defense theory (*See* Pet. at 21-24) the government quotes from requested instructions Numbers 15 and 18 and argues that they were not appropriate. Opp. at 15-16. But petitioners never claimed that the refusal to give those instructions was error. The error was with respect to request numbers 16 and 20, which were quoted in petitioners' brief to the Eleventh Circuit. These requested instructions, which are set forth below, would have provided the jury with a standard for determining whether the joint venture was a part of the alleged bid-rigging scheme.

Proposed Instruction #16:

> (2) Unless you specifically find beyond a reasonable doubt that Wesley C. Paxson and G. W. Walther Ewalt agreed on or before September 7, 1979 that Paxson Electric Company and Dynalectric Company would form a joint venture to perform the electrical construction portion of the work on the Snapfinger project, you must find Mr. Ewalt and Dynalectric Company not guilty.
>
> (3) Unless you specifically find beyond a reasonable doubt that Mr. Ewalt agreed to submit an artifically high bid on the Snapfinger project as partial compensation for Paxson Electric agreeing to enter into the joint venture, you must find Mr. Ewalt and Dynalectric not guilty [R4-92-24-25];

Proposed Instruction #20:

> [I]n order to find the defendants guilty, you must find that one or more of them committed some act or conduct in furtherance of the conspiracy after September 20, 1981. In particular, unless you find that Mr. Paxson and Mr. Ewalt agreed before the bid on September 7, 1979 that they would ~~form a~~ joint venture to perform the electrical construction portion of the Snapfinger project as part of an agreement to rig bids for that project, you must find all defendants not guilty. (footnote omitted) [R4-92-31-32].

The essential element contained in these instructions, and lacking in those given by the court, is a nexus between the alleged bid-rigging agreement and the joint venture, which was the conduct by which it was claimed that Dynalectric and Ewalt joined the alleged conspiracy and the only conduct by them that continued to within the statute of limitations.[2] Since there was evidence that

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[2] The refused instructions cited by the government are irrelevant to the issue on appeal. Contrary to the government's argument, nothing in the requested instructions would mislead the jury into

the joint venture was lawful (as the government has conceded, Pet. at 11) and since that was the theory of the defense (as the court below recognized, App. A at 4a), it was plain error to refuse these instructions.

4. The government tries to justify the erroneous rulings excluding defense economic evidence by claiming that it was barred from using evidence of high prices and profits to establish the conspiracy. Opp. at 6.[3] This is not only irrelevant, it is also a mischaracterization of the record, as is the government's argument that petitioners were permitted to show that these bids were not excessive. Opp. at 16.

The government contends that this evidence was irrelevant because there was no testimony that the participants actually took market conditions and copper prices into consideration in the preparation of their bids. The contention that "raw material" prices or "general market conditions" cannot be relevant unless there is this specific reliance during bid preparation is not only unsupportable in the record, but ignores the real-world context in which businessmen make pricing decisions. Furthermore, it overlooks the fact that Ewalt testified as to his concern about inflation and interest rates and explained how material costs in long-term contracts and changing conditions can affect profitability. R7-1284, R8-1456-1459. It is axiomatic that a company like Dynalectric, which submits hundreds of bids a year, must always have an awareness of the economy, labor and materials markets in making pricing commitments that extend far into the

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believing that a lawful joint venture would make a bid-rigging agreement lawful. Opp. at 15. To the contrary, they properly focused exclusively on the issue of whether the joint venture was *part* of the conspiracy to rig bids.

[3] This argument is fundamentally at odds with the government's claim that there was an "overcharge" to support its mail fraud theory (Opp. at 11 n.10) and of "illicit profits" to support a continuing conspiracy (Opp. at 8 n.8).

future. No firm would survive otherwise. To a jury, however, these factors must be explained and defendants were prohibited from doing that.[4]

The relevance of the economic evidence was not, as the government argues, removed from the case by the jury instructions. Opp. at 17. The jury was never told to disregard evidence of profits and the court denied defendants' requested instruction that evidence of high and unusual profits (emphasized by the prosecutor throughout the trial) could not be considered as proof of guilt. The government's attempt to reconcile the ruling below with those of other circuits is futile. Each squarely held that a defendant is entitled to present economic evidence to show the absence of a conspiracy irrespective of whether or not the prosecution introduced economic evidence. *See* Pet. at 25-26 and cases cited therein.

The petition for writ of certiorari should be granted.

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* Counsel of Record

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[4] Moreover, to suggest that "copper prices" were irrelevant because copper is in some distant "raw material market" (Opp. at 6) is disingenuous. The project required electrical cable—hundreds of miles of it—in which copper was the primary component. Defendants sought to illustrate the relation between copper and cable by introducing samples of conductor to show its copper content, but the district court excluded that evidence too.